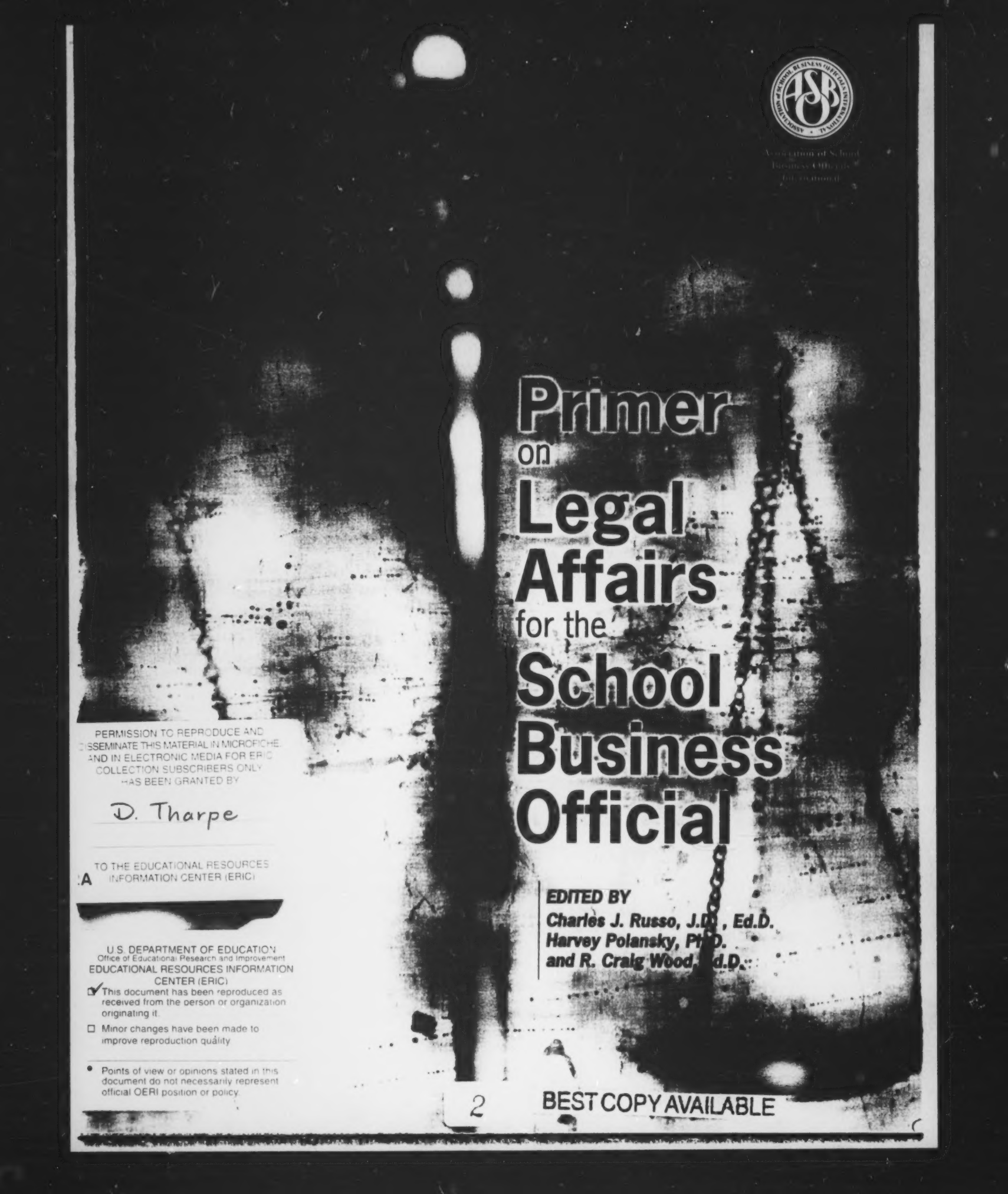
DOCUMENT RESUME

ED 455 607 EA 031 205

AUTHOR	Russo, Charles J., Ed.; Polansky, Harvey, Ed.; Wood, R. Craig, Ed.
TITLE	Primer on Legal Affairs for the School Business Official.
INSTITUTION	Association of School Business Officials International, Reston, VA.
ISBN	ISBN-0-910170-82-7
PUB DATE	2001-00-00
NOTE	216p.
AVAILABLE FROM	Association of School Business Officials International, 11401 North Shore Drive, Reston, VA 20190. Tel: 703-478-0405; Fax: 703-478-0205; Web site: http://www.absointl.org.
PUB TYPE	Books (010) -- Collected Works - General (020)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Board of Education Policy; Charter Schools; *Constitutional Law; Contracts; *Court Litigation; Dress Codes; Educational Vouchers; Elementary Secondary Education; Federal Courts; Federal Legislation; Freedom of Speech; Negligence; Personnel Evaluation; Privatization; School Based Management; *School Business Officials; *School Law; Search and Seizure; Special Needs Students; State Church Separation; State Courts; Student Rights; Student Transportation; Teacher Rights
IDENTIFIERS	Americans with Disabilities Act 1990; Establishment Clause; First Amendment; Fourth Amendment; Individuals with Disabilities Education Act; Rehabilitation Act 1973 (Section 504); Supreme Court

ABSTRACT

This book provides school business administrators with an introduction to a variety of legal issues relevant to their professional roles. The book is divided into three major sections: management issues, employment issues, and constitutional issues. The topics covered in the seven-chapter section on management issues include board and district-policy, contracts, supervision of students, privatization of K-12 public education, legal aspects of site-based management, transportation, and charter schools. The two-chapter section on employment issues deals with supervision and evaluation of school personnel and employee rights. The last section, constitutional issues, contains four chapters that deal with the following topics: services for students with disabilities, religious influences and the public school, student free speech and dress codes, and the Fourth Amendment and the quest for drug- and weapon-free schools. (PKP)



Primer on Legal Affairs for the School Business Official

EDITED BY
Charles J. Russo, J.D., Ed.D.
Harvey Polansky, Ph.D.
and R. Craig Wood, Ed.D.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY HAS BEEN GRANTED BY

D. Tharpe

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

BEST COPY AVAILABLE

Primer on Legal Affairs for the School Business Official

EDITED BY
Charles J. Russo, J.D. , Ed.D.
Harvey Polansky, Ph.D.
and R. Craig Wood, Ed.D.

Primer on Legal Affairs for the School Business Official

EDITED BY
Charles J. Russo, J.D., Ed.D.,
Harvey Polansky, Ph.D.,
and R. Craig Wood, Ed.D.

DESIGN & LAYOUT:
Pamela N.Higbie
and Annette Verna

COVER IMAGE:
© Stone Images
T. Stewart and R. Baxter

ISBN No. 0-910170-82-7
© 2001 By ASBO Int'l.
All rights reserved.

Association of School Business Officials International
11401 North Shore Drive ■ Reston, Virginia 20190 ■ (703) 478-0405
(703) 478-0205 Fax ■ www.asbointl.org

TABLE OF CONTENTS

Preface v

MANAGEMENT ISSUES

Chapter One: Board and District Policy 1
by William Shula

Chapter Two: Contracts 15
by Carole W. Briggs

Chapter Three: Supervision of Students and the Law: A Primer on Negligence 31
by Charles J. Russo

Chapter Four: Privatization in K-12 Public Education 41
by Frank Brown & Richard C. Hunter

Chapter Five: Legal Aspects of Site-Based Management 65
by Harvey B. Polansky

Chapter Six: Transportation 77
by Ralph D. Mawdsley

Chapter Seven: Educational Reform: Charter Schools and Voucher Systems 93
by Richard A. Mills, Jr., Christine L. Chinni, & Anne H. Littlefield

EMPLOYMENT ISSUES

Chapter Eight: Supervision and Evaluation of School Personnel 111
by C. Daniel Raisch

Chapter Nine: Employee Rights 125
by David L. Gregory & Laurie Ann Martino

CONSTITUTIONAL ISSUES

Chapter Ten: Services For Students With Disabilities 155
by Allan G. Osborne, Jr.

Chapter Eleven: Religious Influences and the Public Schools: Surveying the Contemporary Wall of Separation 173
by Charles B. Vergon & Robert J. Beebe

Chapter Twelve: Student Free Speech and Dress Codes 197
by David Schimmel

Chapter Thirteen: The Fourth Amendment and the Quest for Drug and Weapon Free Schools: Implications for School Business Officials 215
by Jacqueline A. Stefkovich & G. Michaele O'Brien

Authors 229

PREFACE

■ by R. Craig Wood

This book on legal aspects of public education school district management is intended to acquaint and introduce the reader to a variety of aspects of fiscal and legal management. Obviously, no single work can either be all embracing or should it be construed to take the place of competent legal counsel. However, despite these limitations, it does offer an overview via an exposure to the scope of issues that fiscal officers of school districts deal with almost every day in their professional roles. Unlike many arenas of educational administration and leadership, the fiscal as well as legal management of a school district is strictly observable and accountable to the public. The wide variety of tasks associated with this area of leadership cannot be surveyed within any one text. Thus, school business management has taken on the reality of realizing that many skills, knowledge bases, and duties that are encompassed in this vital area known as the law.

In Chapter One, William Shula discusses school board policy as the cornerstone of sound fiscal and legal management of a school district. Generally, local school board policy operationalize state statutes, rules, and regulations, and embraces, where appropriate, local decisions regarding the educational services of the school district. Generally speaking, a local school board may not assume any responsibility that state statutes do not authorize. At the same time, it is important to note that local school boards may not shed any responsibilities that state statutes dictate that local school boards must deal with.

In Chapter Two, Carole Briggs covers the concept of contracts, particularly as related to purchasing goods and services. She offers a general overview of the bidding process. The reader will note that bidding procedures are highly state specific and usually found within the state code as to specific regulations and controlling procedures.

Chapter Three, by Charles J. Russo offers a primer in the area of negligence as applied to students. Russo discusses the traditional elements of negligence and makes the reader aware of this important area. Again, the reader should be cautioned that within a public school setting state statutes and case law are controlling particularly as it applies to claiming some form of immunity. Further, the issues of contributor and comparative negligence vary greatly from state to state. Even so, the concepts presented and are important as they relate to supervision of students.

Frank Brown and Richard Hunter discuss the privatization of public education in Chapter Four. The authors present a broad overview of this political and economic concept, discussing their views of the political arena in which public education must operate. The authors note that public education operates within a marketplace that reflects educational, political, and economic issues.

Harvey Polansky reviews the legal aspects of site based management in Chapter Five. In this chapter he defines site-based management and gives examples in which the concept has emerged, pointing out that the critics of public education argue that site-based management will not fully resolve the weaknesses of the present system.

In Chapter Six, Ralph Mawdsley discusses legal issues relating to transportation that every school fiscal officer should be fully aware of. The author notes that student transportation and the resulting liability issues present a collage of interacting issues.

In Chapter Seven, Richard Mills, Christine Chinni, and Anne Littlefield present an overview of charter schools and their relationship to vouchers. The chapter describes a variety of charter schools and voucher initiatives that have been introduced throughout the nation during the past several years. The authors discuss the interaction of the charter school concept with the potential conflict of the First Amendment as well as a variety of state constitutional restrictions.

In Chapter Eight, Daniel Raisch examines the supervision and evaluation of school personnel, an area that often consumes public school administrators. The author discusses the purposes of supervision and evaluation as well as various forms of such activities.

David Gregory and Laurie Ann Martino discuss employee rights in Chapter Nine. The authors offer a concise introductory overview of employee rights from the Family and Medical Leave Act to the sexual harassment. The authors point out the variety and scope of the range of issues involved with rights of public school teachers.

In Chapter Ten Allan Osborne discusses services for students with disabilities. Osborne presents overviews that school administrators must know to avoid legal liability for their school districts. He also reviews services for the disabled within public school environs along with various standards that school districts must observe and follow.

In Chapter Eleven, Charles B. Vergon and Robert J. Beebe examine the parameters of religious influences on public schools. More specifically, they discuss the frequently contentious issues surrounding the place, if any, that religion should play in public schools.

In Chapter Twelve, David Schimmel discusses student free speech and dress codes. He provides a board overview of an area in which schools find controversy and potential disruption to the educational process.

Jacqueline Stefkovich and Michaele O'Brien present a discussion of the Fourth Amendment and its relationship to drug and weapon free schools in Chapter Thirteen. The authors present an overview that sheds light on what are and what are not acceptable actions by the courts in terms of protecting students from the presence of drugs and weapons in the public schools.

This introductory work offers readers a variety of perspectives and issues of which they must be aware. The practice of school business management is a varied and dynamic one calling upon a wide variety of skills. The continuing education, both formal and informal, of professionals such as school finance officers is an ongoing process. Thus, the editors and authors hope that this text will help school business officials and other educational leaders to be better prepared to address the myriad of legal issues that they face on a daily basis.

MANAGEMENT **ISSUES**

Board & District Policy

—

Contracts

—

Supervision of Students

—

Privatization in K-12 Public Education

—

Legal Aspects of Site-Based Management

—

Transportation

—

Educational Reform: Charter Schools

CHAPTER ONE

Board and District Policy

■ by William Shula

Policy development, traditionally neglected until times of crises, has led to manuals that collect dust on administrators shelves. However, the dust on these manuals is swiftly blown away in response to public outcries for changes in inappropriate curriculum or for purposes of eliminating textbooks with sexual content. When a bargaining unit threatens a board with a grievance associated with unfair labor practices, for instance, or when contract negotiations reach an impasse, the importance of policy development becomes immediately clear. Since policy development is oftentimes overlooked and because it is essential to the operation of institutions, this chapter reviews the legal authority of boards to establish policy, the foundation of policy development, and the procedures for the formulation of an effective policy.

Board policy may be defined as a locally written set of adopted guidelines which relate to the mission of a school district and which frame its goals. The written plan serves as a road map for board members to follow and helps to remind them of their goals and responsibilities. Further, a policy document should be discussed, decided upon, and executed including directions about how and when things will be done and who will do them.[1]

Board policy must be a clear and concise document providing a framework, guide, and blueprint for current and future actions of board members. Insofar as board policy contributes to the success of an educational organization over the long term, a policy making board may face liability if it fails to maintain relevant procedures.

Nationally, school reform has challenged boards of education to develop manuals with relevant policies which address curriculum changes and confrontations

that occur in local communities. A struggle continues, however, between the establishment of nationally regulated standards and a board's discretion to serve its local constituents.

Historically, district trustees have held steadfastly to their rights by adopting regulations that originate at the federal level. Statutorily, a board has the latitude and flexibility to establish regulations to address its constituents' educational needs.

A policy that is developed by a local board should be both a community guide and a means to an end — the effective instruction of a district's youth. At the same time, it should be flexible enough to withstand public scrutiny, yet easily interpretable by its users. Finally, through on-going evaluation, a manual's applicability as a board handbook is safeguarded. Policy must be developed, expanded, improved, and revised as necessary for changing school and community needs.

Historical

The framework of duties and responsibilities of local boards of education were established in the early seventeenth century. During our country's first two hundred years, local boards of education consisted of citizens gathering in town meetings to make general decisions about their communities; these decisions included those of educational concerns. School trustees have traditionally had wide latitude in discharging duties to local constituents.

Prior to 1789, the formal education system of the United States was reserved primarily for wealthy citizens. Because the settlers' primary concern at this time was on survival in a new country, most children were educated at home. In addition, poor southern white and black children were entirely excluded from the formal education system.

Religious leaders supported a movement to guarantee children the opportunity to learn reading and writing skills with an education based upon religious instruction. In 1642, Massachusetts passed a law requiring parents and guardians to assure their children reading and writing training, an understanding of the principles of religion, and the knowledge of the laws of the Commonwealth.

The "Old Deluder Satan Law," enacted in 1647, also in Massachusetts, required every town of fifty or more families to appoint a teacher to provide instruction in reading and writing. This law was adopted to combat Satanism by establishing formal schooling for children by officially employed teachers. This law both originated the use of public funds to support schools and also delegat-

ed control of schools to a local governing board. During this time, there were only two purposes for teaching children to read: to enable an understanding of religious doctrine and to help them become moral adults in compliance with the Protestant Reformation in Europe.

With the passage of the 1642 and 1647 Massachusetts Acts, the delegated responsibility for education rested on the local townsmen who held community legislative positions. School matters fell under the jurisdiction of local government officials who reviewed educational policies at public town meetings. Eventually, in New England, subcommittees of selected men were charged with the responsibility of overseeing school operations. This 1721 school committee was the forerunner of the modern-day local school boards now found in all fifty states.

During the post-revolutionary period, the ideals of citizens shifted. Most agreed that past education practices in this country were not effective for the creation of a democratic society, and so, through the enactment of the Northwest Ordinance of 1787, Congress set out to change our system. After dividing the northwestern territory of the United States into townships of six square miles, Congress set aside sections designated solely for the use of schools. This action spurred an incentive to establish and fund schools and also encouraged a migratory movement toward the West.

During the nineteenth century, in an attempt to regulate and standardize education, state boards of education and departments of education were created. Because local school boards perceived these new systems as restrictive, the statutes passed during this century were met with resistance.

The state legislatures, limited only by the Constitution of the United States, have authority to control the educational policies within the states. "The legislature has entire control over the schools of the state ... [including] [t]he division of the territory of the state into districts, the conduct of the schools, the qualifications of teachers, [and] the subjects taught..." [2]

A local board of education has been created by a legislature to administer and supervise schools within its jurisdiction. Board duties are both delegated and implied with a wide discretion given to the board to carry out these powers. In fact, broad discretion may be exercised by a board of education so long as its acts are not arbitrary, wanton, or exhibit an abuse of discretion. [3]

Each state has passed legislation which makes local board members agents of the state. States have duties to provide education within their boundaries and have enacted legislation which places local boards under the indirect control of the state legislature and state boards of education.

Local boards have considerable latitude in developing policies and procedures, but the state has authority to counter local policies that do not comply with state mandates. Yet, because national and state reform requirements are questioned locally, there is a threat to the ability of boards to control their schools.

Boards of education, acting in concert with their superintendents, have the power to make rules and regulations necessary for the management of schools and school personnel under their jurisdiction. Generally, the courts will not interfere with the exercise of discretion by a board unless there is a clear abuse of this right or a violation of law.

The courts are not inclined to interfere with the rules and regulations adopted by local school boards. Courts do not need to consider if the regulations are expedient, popular, or wise but rather whether there is a reasonable exercise of the power and discretion by the board. [4] "A court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of the board, upon any question it is authorized by law to determine." [5] All policies must be adapted to the purpose and mission of a board and cannot be contrary to statute, arbitrary, unreasonable, or capricious. Beyond the limits of mandatory laws and directives, there is broad leeway for school boards to act, so long as they follow the spirit of the laws and do not contravene constitutional and statutory requirements and prohibitions, or the federal constitution and Supreme Court interpretations. [6]

The authority to establish district codes is a vital role of the board of education in managing the public schools under its watch. This authority cannot be unethically compromised or delegated.

The Foundation

Planning is not only the foundation and future of any quality school district or organization, but is also a critical dimension of leadership. Tomorrow's academic achievements are directly related to the goal setting and strategic planning which school boards currently undertake. The outcomes of planning are the policies and legislation by which a school board is guided, from which the school personnel are directed, and by which the communities regulate and manage their schools. "Without planning, an organization has no identified, established procedures for developing clearly articulated statements of purpose or actions." [7]

Boards of education need meaningful input from their chief administrators and other knowledgeable educators in order to make informed decisions and estab-

lish effective policies for their districts. In policy making and legislation, there is a reciprocal relationship between a board and school personnel. If policies and legislation are to guide administration, those who make policies and legislate must know what the administration values. Hence, policy making and legislation must be guided by the administrations knowledge about the schools. A chief executive must point the way for those who have the responsibility for education policy since legislation can energize administration.[8]

A school district's mission and philosophy must frame the planning and policy function of the board of education. Mission and philosophy are inherently related. Mission is the purpose, the special service to be performed. Philosophy is the system of beliefs and principles which directs action toward the mission's implementation and achievement. In practice, philosophy is an expression of the value system of persons establishing the institution's mission and of those working to fulfill it.[9]

Specific goals and objectives which collectively frame a board of education's policy are rooted in mission and philosophy. These directional statements, formulated collaboratively and collectively with the board, staff, and community influence, provide a means of holding the chief administrator and staff accountable for school improvement. A superintendent and school staff develop specific measurable objectives, whereby district goals are used as a means for the evaluation of instructional improvement.

In the interest of a community, it is a school board's duty to determine and execute policies that are essential to the effective operation of the district's public schools. Policies are formulated through the agreement of the members of the board as guides for its employees. Basic policies and principles should be incorporated into district rules and regulations. These policies should be capable of being applied uniformly and equitably to all possible circumstances. When a board finds it necessary to modify and revise its policies constantly in order to address each particular case, a policy is inadequate.

Although a board of education oversees a school district, the authority to manage lies in the laws of the state. Any locally developed administrative regulations and codes must be consistent with adopted board policies and should be implemented fairly and uniformly. In addition to a superintendent's directives, local building and classroom procedures must conform to district policies.

When a board acts separately on current issues rather than adopting fundamental policies, the result is an ineffective, inconsistent board of education. Because board members and staff change and new individuals may know little of

past board decisions, these individuals may act contrary to former actions. A thorough study of previous board minutes should clearly reveal board precedent. Historical renderings taken by a board of education should guide current board action. A policy, once adopted, can be applied fairly to all issues a board is called to act on. An indecisive, vacillating board frequently changes direction and seeks reaffirmation of its mission. Such a board needs to reestablish its mission, philosophy, goals, and objectives instead of changing its core policy.

Policy Development

Four key questions frame the process of policy development: Are policies clearly stated? Do they address current legislation and statutory requirements? Are they local and community focused? Can administrators and staff effectively implement the adopted board policies? This section focuses on organizational components integral to the policy development process. Beginning with the organization of the process, document formulation, and implementation, this section also explores suggestions for the development of effective policy development.

Organizational Process

Who will be involved in the policy development process? Will a board learn from history? How will a board deal with current and evolving issues? From a practitioner's viewpoint, these are essential questions for organizing a planning process.

A board of education should form a policy development team which is assigned clearly delineated duties. This team should understand the board's procedures, practices, and expectations for the task. When each member has an understanding of his or her role in the process, little is left to chance.

Although a board may adopt a team procedure for policy development, it is the responsibility of the entire board of education to adopt these policies. With the increased popularity of site-based decision-making in many states, boards may wish to consider participatory management as a core component in the policy revision structure.

There are five guidelines for policy development by school boards:

1. Maintain a record of currently adopted policy stipulating revision procedures for inadequate governance practices. For example, how many read-

ings of new policy must a board complete before it can take formal action to adopt?

2. Establish a policy team comprised of board members, administrators, staff, parents, and community members. The team should have the authority and latitude to develop the necessary local regulations for the board to consider for action. Openness, honesty, and clarity of mission will result in a functional team.
3. Determine whether the committee will develop policy with the aid of a consultant service or attorney. The review of currently adopted language, state legislation, board minutes, staff handbooks, student handbooks, and negotiated employee agreements is an arduous, yet essential function. Most school districts will not have the legal expertise on staff needed to develop a policy document. Minimally, a board should enlist the service of a school attorney to review recommended policy prior to its adoption.
4. Establish timelines for policy development and revisions. In order to keep written policies current, they should be reviewed on a continuing basis. A policy team needs to be given a reasonable time frame in which to work, especially when an entire manual is to be revised. It is not uncommon for the process to take longer than one calendar year.
5. Promulgate definitive statements of policy to ensure a district's ability to meet increasing public demands regarding education issues. Policy development will include as much information from as many sources as possible. Policies must be re-evaluated and appraised regularly so that they may serve all the constituents fairly. Policies should remain broad enough to allow for professional discretion and narrow enough to give staff clear guidance.

There are four things that boards need to be aware of when developing effective policy:

1. Do not rush to justice. A well-organized and thorough review of policy will result in a quality useable document that can last for a reasonable period of time.
2. Recognize that effective communication during a revision process can take considerable time and effort. It is important to realize that consensus building does not automatically occur. Barriers between board, staff, and community may need to be bridged prior to the acceptance of a new policy statement. A clearly stated and communicated document will be a safeguard against misunderstandings.
3. Acknowledge that a misstated policy is fertile ground for grievances, mis-

trust among staff, and lack of community support. The process of policy development can be a public relations tool to demonstrate that a board of education is concerned and interested in listening to its customers both within and outside the organization.

4. Develop policies to clarify the board–superintendent relationship. Such policies will give the chief executive a clear guide for the administration of the school district. When problems occur in a district, its administration should use a board's standing statement to determine the direction taken to resolve the situation; this saves a board from convening unnecessarily. Since policies are clear, a board avoids involvement in the administrative function of the district. "[T]he policy making body of the school system cannot operate without adequate information ... and the board communicates with the school system through the superintendent of schools..." [10]

Formatting and Implementation

A school board may have hundreds of policies to organize for implementation. There are several systems used to classify policies ranging from numeric to alphabetic models. It is essential that the system is logical and expandable for easy utilization by the board and the administrative staff. The document should be divided into areas of responsibility which include:

1. *Foundations and Basic Commitments.* These are policies which recount a school district's legal status, community involvement, philosophy, mission, goals, objectives, and commitment to evaluation.
2. *Board Governance and Operations.* These include objectives, legal status of members, organization of the board, structure and procedures of meetings, board-staff communications, and evaluation of operations.
3. *School Administration.* This includes all policies that describe administrative goals, duties and responsibilities of the superintendent, management, district annual reporting to the public, and policy implementation.
4. *Fiscal Management.* This includes all policies dealing with budgeting, taxing, borrowing, revenues, depository of funds fiscal accounting, purchasing, payable procedures, and treasurer responsibilities.
5. *Support Services.* This includes all codes relating to safety programs, building and grounds maintenance, transportation services, food service management, clerical services, and data management.
6. *Facilities Development.* This includes all policies covering facility planning,

tax issues, and facility construction.

7. *Personnel and Negotiations.* This includes policies about employment, assignment, evaluation, termination, scheduling, promotion, negotiations, and compensation of support and professional staff members.
8. *Instruction.* This includes all policies on instructional goals, curriculum development, curriculum design, special programming, extra-curricular activities, instructional resources, academic achievement, testing and assessment, and evaluation of programs.
9. *Students.* This includes all policies such as attendance, rights and responsibilities, due process, discipline codes, student fees, and student records.
10. *School-Community Relations.* Essential school-community relations goals are addressed through public information programs, community involvement in decision making, use of facilities, school visitation, and relations with governmental organizations.

If a policy manual is well organized and publicly accessible, board members will be able to discharge their duties effectively and, in this way, board meetings can focus on the general mission of the district. Once policies are developed, educational leaders should plan to provide inservice presentations for staff and board members regarding the proper use of and contents of the document. A district manual should be accessible in all school buildings, public libraries, and board offices. In addition, plan to keep the document current through periodic evaluations and updates. A board policy committee should be a standing committee of the board because it takes continual human and financial commitment to maintain an excellent document.

Conclusion

Where a written statement of mission and goals is extremely beneficial, a written policy manual is vital. A well-intentioned board of education both plans for the future and evaluates the past. The most efficient board must have a blueprint and a framework from which to work.

This chapter has examined the historical background of policy development, the essential planning component, and the practical aspects of policy development. Thus, the author hopes that he has provided a useful guidance document for practitioners.

Notes

1 R. W. Flinchbaugh, *The 21st Century Board of Education*, 152 (1993).

2 *Child Welfare Soc. of Flint v. Kennedy Sch. Dist.*, 189 N.W. 1002 (1922).

3 J. Messick, *The Discretionary Powers of School Boards*, (1968).

4 *Greco v. Roper*, 61 N.E 2d 307 (Ohio 1945).

5 *Brannon v. Board of Educ.*, 124 N.E. 236 (Ohio 1919).

6 C. Grieder, T. Pierce, & F. Jordan, (1969). *Public School Administration*, (1969).

7 *See* Flinchbaugh, *supra* note 1 at 155.

8 J. Sears, *The Nature of Administrative Process*, (1950).

9 J. Seitz, *Effective Board Participation*, (1994).

10 J. Davidson, *Effective School Board Meetings*, 25 (1970).

CHAPTER TWO

Contracts

■ by Carole W. Briggs

This chapter outlines the procedures that a school district and its business official should follow in order to achieve successful contract relationships. The first step in entering into a contract is identifying the school staff and advisors who are necessary to the procurement process and what their respective responsibilities are in representing a district's interests. The next step is to identify a district's goal and the financial resources available to allocate in meeting that goal. A district must communicate its goal to prospective contractors by means of a contract information package which forms the basis of the contract between it and the potential contractor. The more clearly a district communicates its needs, the more likely it is to purchase goods and services with the best value.

A school business official's (SBO) role in the contracting process is that of a director or a quarterback. Depending on the situation, a SBO coordinates the efforts of colleagues, subordinates, and professional advisors to obtain a contract, as for example, in a construction project. Or, a SBO may be directly responsible for preparing the bid package, negotiating with the low bidder, and presenting a contract to the school board for approval, as for example, in the acquisition of a new copier for the school's administrative offices. More often, a SBO plays a combination of these roles.

A SBO's first responsibility in any procurement setting is to identify the players and what their respective roles will be during the bidding process. The following discussion assumes that a SBO will be coordinating a school district's efforts during the procurement process. If a SBO does not have this role, then this chapter can be used as a checklist to ensure that the

issues relevant to a successful contract are addressed by a school district before a contract is signed.

The issues that may be relevant to any contract depend on its purpose. Consequently, a school construction project will raise different concerns than will a multi-year bus contract. Even so, a number of similarities are present in any contracting situation. A SBO needs to recognize these similarities and consistently apply them in all district contracts.

An approach that recognizes similarities introduces uniformity into a school district's contracts, making them easier to interpret and enforce. For example, a SBO faces a much easier task when a standard set of purchase order terms is available for the ten to fifteen separate contracts that must be prepared and signed in August before the start of the school year.

Identifying a School District's Needs and Goals

A SBO normally receives his or her procurement charge from the superintendent or the board. This charge is often very vague — "we need new computers" or on occasion very specific — "we need 3 XJ4 Gizmos for the Art Room." When a charge is specific, a SBO merely needs to confirm that a school district's goals will be met by the stated charge. A SBO may also find it necessary to integrate a short term procurement need into a district's long range goals. Where a goal is more general, a SBO may have to conduct a further investigation to determine how a district's stated goals, both short and long term, can be best achieved. This investigation may involve the use of technical and/or legal experts depending on the complexity of the goal or possible legal restrictions in achieving the goal. Once a district's goals have been identified, a SBO needs to establish, or help create, the contract's budget and funding source(s).

The Contract Budget and Funding Sources

For many school districts, there are legal restrictions on how much can be spent on the procurement of various goods and services in any one fiscal year. Moreover, districts usually cannot borrow to fund contracts without additional local approvals. State or even federal approval may also be required depending on the subject matter of the contract and funding source.

Legal Requirements for Bid Solicitation

Federal Requirements

Normally, the only federal requirements for school contracts are the equal employment opportunity laws regarding nondiscrimination by the contractor in its hiring practices. However, there may be additional requirements such as prevailing wage laws and various affirmative action mandates if federal funds are used on projects.

State and Local Requirements

Each state imposes its own set of rules on the school districts within its jurisdiction. Yet, because it is intended as a broad overview, these specific rules are beyond the scope of this chapter. A SBO should be familiar with these restrictions through experience or by conferring with the school district's attorney.

Municipalities and school districts themselves may impose additional restrictions or requirements upon a system's procurement process. A SBO will need to take into account all of these levels of legal requirements in soliciting bids. Failure to do so normally voids the bids and the resulting contract, if any. Once a SBO has helped to identify a district's goal, the contract budget and the legal requirements for the bidding process, a SBO must prepare the procurement documents.

The Procurement Documents

The procurement documents, which are a school district's written declaration of its stated goal, may be in the form of a request for bids or proposals. If the documents set forth an objective set of criteria for a potential contractor to meet with a stated price or price formula, this is normally referred to as a request for bids. A documents that is more open-ended and allows the potential contractor the opportunity to propose a means of achieving the school district's stated goals is referred to as a request for proposal (RFP).

Requests for Bids and Proposals

Requests for bids are usually used in the procurement of basic goods and services wherein a district identifies its own method of achieving its goal. In more complex procurement situations, a district may seek the expertise of potential contractors in proposing alternative means of achieving its stated goal through the RFP process.

If a school district uses requests for bids to purchase goods or services, the award of a contract normally is made to the lowest responsive bidder. In the

RFP process, the winning contractor may be selected based upon a combination of factors, including experience, personnel, and price. Based on a district's stated goals, a SBO can usually determine whether requests for bids or RFPs are the more appropriate procurement method. A SBO should confirm this selection prior to commencing the procurement process since this will help to avoid unpleasant surprises at the end of the procurement process.

The Contract Specifications

In both the request for bids and RFP processes, a SBO needs to prepare a package of information for potential contractors. This package should contain at least the following items:

1. Statement of the District's Goal
2. Contact person in the District
3. Time period for submitting a response (bid or proposal)
4. Project specifications such as the number of students to be transported, past bus route information, and/or school schedule
5. Necessary qualifications of potential contractors
6. Evaluation criteria for a bid or proposal
7. Statement of form to be used for submitting a bid or proposal
8. Form of the proposed contract

The information package can be tailored in size and scope to the relative importance of the goods or services being procured. A multi-million dollar construction project information package will look very different from a pencil and paper supply package but both should contain the eight specifications listed above. The last item, the proposed form of the contract, is most important. It is, however, very often left out of the information package and not prepared until the procurement process narrows down the potential contractors to one or two. As noted in the next paragraph, this method of negotiating a contract puts a district at a disadvantage for several reasons and should be avoided.

By preparing a contract ahead of time, a SBO is forced to focus on issues that are important in the procurement process. A district can put provisions in a contract that are favorable to it and not have to negotiate with the contractor about the terms. The presence of a proposed contract in the information package also eliminates claims of surprise or unfairness by potential contractors. Finally, a SBO can develop and implement a standardized set of contract terms to use in a wide variety of situations. A sample set of terms is included in the Appendix of this chapter.

Selecting a Contractor

The process of selecting a contractor under the bid process is different from selecting a contractor under the RFP process. In a bidding competition, the most important factor is the bidders' prices. Conversely, in an RFP setting, price is only one of several elements that may be considered by a school district in selecting a contractor.

Contractor Selection in the Bid Process

Once a SBO has prepared the bid information package and received the bids on the appointed day, he or she faces the task of reviewing some or all of the bids to confirm their compliance with the requirements of the bidding process. This task can be simplified by using a checklist and noting that each bid contains all of the necessary components. These bid parts may include an insurance certificate, a surety bond, the bid amount, and the contractor's statement of qualifications.

Normally, a SBO can start with the apparent low bidder's package. If the package is complete, and the bidder meets all of the other bid qualifications as allowed by law, a SBO's task should be over. A sample of contractor qualifications is included in the Appendix of this chapter. As a precautionary measure, a SBO should consider reviewing the bids of the lowest two or three bidders. A review of these bids enables a SBO to check that the bidders did not misinterpret any information provided in the contract specifications. It is also common for the second or third lowest bidder to claim that the low bidder left out information in its bid or that there is a mistake in its own bid, which, if corrected, would cause that bidder to become the low bidder.

Bid Protests

Bid protests usually cover two types of issues: nonresponsive bids and mistakes. Bid protests are subject to the statutes and common law of each school district's state.

Nonresponsive Bids

In general, nonresponsive bids arise where a potential contractor fails to meet one of the requirements of the contract specifications. In some jurisdictions, any deviation is grounds for rejecting a bid. In other jurisdictions, the courts have allowed school districts to determine whether a bid is nonresponsive in a material respect. Another way of asking this is, if the requirement were waived, does it give this contractor a material advantage over other bidders? Alternatively, would it be fair to the other contractors if this bid were accepted? An exam-

ple of a bid that is nonresponsive on a material item might be where a contractor excluded ledge removal from price in a bid that required all excavation as part of price.

Mistakes in Bids

Mistakes in bids can arise in at least three ways: the component amounts do not add up to the total amount of the bid, there is an obvious math error on the face of the bid, and/or the bidder has made a math error in preparing its bid which is not obvious.

Bid protests are inevitable in the contracting process. Depending on applicable law, a SBO can ignore the bid protests completely, or more likely, will be forced to resolve each claim on a case by case basis. Depending upon the significance of a contract, a SBO may suggest obtaining legal advice prior to denying any bid claim.

Awarding of and Signing the Contract With the Bidder

Upon completion of the bid review process, a SBO should be able to use the previously prepared form contract for purposes of entering into a written agreement with the successful bidder. In the event that there is no form contract, a SBO should prepare one at this time. The contractor should not be allowed to submit a proposed form of contract as it is likely to have provisions favoring the contractor that are difficult to eliminate completely from a contract during negotiations. Therefore, it is much easier to present the contractor with a school district's version of a contract and make the contractor sign the agreement. There is a caveat to this approach. A contract should not be so one-sided that the contractor balks at signing it because if this contractor refuses to sign the agreement, then other bidders may also refuse to sign and may require a district to re-start the entire bidding process.

A second issue to remember is that a contract should not materially vary from the project specifications in the bid information package as unsuccessful bidders may claim that these variances are an end run around the bid requirements. This could cause a school district to have to reject the low bid and to recommence the bidding process.

Prior to awarding a contract, a SBO must identify and take the necessary steps to authorize such an award. These steps may involve obtaining the approval of the school board and/or local municipality depending on the type and value of the contract. Since contracts signed without the required approvals are usually void, this step is essential to any successful contract.

Contractor Selection in the RFP Process

Due to the open-ended nature of the RFP process, a SBO may have difficulty reviewing competing contractors' proposals. A SBO has the opportunity, not present in the bidding process, to interview the potential contractors and obtain answers to specific questions. Insofar as the proposal process is used for long term, costly and/or technically complicated procurements, these interviews can be very helpful. A SBO can verify how a proposal would achieve the school district's goals; eliminate respondents whose qualifications appeared acceptable on paper, but were lacking when questioned in person; and, determine whether a respondent is a good match with a school district.

After the interview and proposal review process is completed, a SBO should be able to make a recommendation to the school board as to the most qualified and responsive candidate. At this time, a SBO needs to confirm that all necessary approvals to award a contract have been obtained.

The Contract

Anyone who has ever negotiated, written, or signed a contract has wondered about what was left out of it, especially what might become a critically important issue when the agreement is being performed or is in dispute. The key to any successful contract is to strike a balance between general statements of principle and detailed obligations since this enables the parties to use the contract language as a guide in specific situations that are not covered by express terms. If a contract is too specific, it is usually too long and too difficult for the parties to follow. If a contract is too general, the parties will lack the necessary keys to apply it fairly to a wide variety of situations that may arise during the term of the agreement.

The execution of a contract by a school official marks a change in a SBO's role in the procurement process. A SBO changes from a director or quarterback to a monitor. A SBO's task is to ensure that both the contractor and the district are meeting their obligations under the contract. All contracts should contain at least the following terms:

1. Identities of the parties and contact person for each party
2. Scope of goods and/or services offered
3. Price and payment terms for goods and/or services
4. Length of the agreement and method(s) of early termination

Other important provisions that should be considered and included, if necessary:

1. Remedies for specific breaches of contract
2. Dispute resolution (such as mediation or arbitration)
3. Confidentiality of school district pupil and staff personal information
4. Ownership of custom-made goods and/or services
5. Special laws and regulations governing subject of contract and impact on contract of changes in these rules
6. Nonappropriation clause, if allowed, in multi-year contract
7. Options and renewal terms
8. Insurance coverage
9. Financial capability of contractor

It must be pointed out that this list is not exhaustive. Rather, it is offered as a starting point to consider issues that need to be addressed in the procurement process. A SBO should look to other resources for assistance in developing and refining a school district's procurement contract. Colleagues in other districts who have already completed a specific kind of procurement can point out problems they faced during the process. ASBO and its state affiliates can also provide information on contracts and the procurement process. Finally, a contract, as a legal document, is certainly a subject with which the school district's attorney should be familiar. While a SBO may not have sufficient financial resources to have a district's attorney draft the entire contract, it may be cost effective to have the attorney review a draft of the proposed contract, or at least, its most important provisions.

The Future of Public Contracts and The Procurement Process

A number of organizations have been studying the procurement process, particularly as it relates to information technology. Buying Smart, a report produced by a joint task force of the National Association of State Purchasing Officials and the National Association of State Information Resource Executives (September, 1996) identifies 5 priorities for procurement reform:

1. Simplifying the procurement of commodity items and services
2. Building an infrastructure for electronic commerce
3. Procuring information technology based on best value,not lowest cost
4. Developing beneficial partnerships with vendors
5. Solving problems with solicitations

All of these reforms are potentially applicable to any kind of procurement process. Even so, local and state statutes must be modified in many respects to permit any of these reforms to occur. It is possible that SBOs can implement some of these suggested reforms on an informal basis. For example, if a district has access to the Internet, there is no reason that requests for bids and RFPs cannot be posted there along with the legally required published notices. These kinds of actions by SBOs can help improve a school district's position in the marketplace.

Conclusion

A contract represents the written understanding between a school district and contractor. It results from a procurement process where the district identifies its needs and goals, and a contractor proposes to meet those same needs and goals. In the ideal procurement process, there would be no need for a contract because both parties would fully understand the other's position and mutually agree on all issues. However, the procurement process is less than ideal as a district may not be able to clearly state its needs, the contractor may not fully understand these needs, and neither party may have the capability of fully performing its obligations under the contract. It is for these reasons that written contracts exist. The parties can look to this document as a synthesis of the procurement process that preceded its execution. The more that a contract reflects this synthesis, the more likely it will be that the contractual relationship between a school district and a contractor succeeds.

APPENDIX

to Chapter Two

Terms & Conditions

In all that follows, Buyer refers to _____ and Seller refers to the entity to which this purchase order is addressed.

1. The goods subject to this order must conform exactly to any specifications contained on the face of this purchase order or incorporated by reference. Any failure of the goods to conform to the specifications will constitute grounds for rejection.
2. This purchase order requires strict compliance. The Seller expressly agrees that both the goods tendered and the tender itself will conform fully to this purchase order on the original tender. In the event of rejection upon failure of the goods or the tender to so conform, Buyer is not required to accept any substitute performance nor to engage in subsequent efforts to effect a cure of the original tender. Buyer may reject the goods if the tender of delivery fails in any respect to conform to this purchase order. Buyer's right of rejection is not intended as an exclusive remedy; and, in the event of a nonconformity sufficient to justify rejection, Buyer may, at its option, (1) reject the whole, or, (2) accept the whole, or (3) accept any commercial unit or units and reject the rest. The exercise of any of the above options shall be without prejudice and with full reservation of any rights and remedies of Buyer upon breach.
3. Goods subject to this purchase order must be tendered in a single delivery unless specifically stated otherwise.
4. This is a destination contract. The goods sold subject to this purchase order are sold FOB place of destination specified in this purchase order. All transportation charges to the point of destination are Seller's responsibili-

ty; Seller shall tender conforming goods at the intended destination; Seller shall give Buyer any notification reasonably necessary to enable Buyer to take delivery. The manner, time and place of tender shall be as agreed and in particular must be made at a reasonable hour, in no event after 2:30 p.m. Eastern Standard Time.

5. The delivery date specified in this purchase order is intended as a firm delivery date that must be met. Seller is obligated to effect delivery on or before the stated date and failure to effect delivery by 2:30 p.m. Eastern Standard Time on that date shall constitute a breach. Buyer may, at its option, accept or reject late delivery, but such acceptance or rejection shall be understood to be made with full reservation of rights and remedies.
6. The risk of loss, damage, or destruction of the goods shall remain with the Seller until the goods have been properly delivered by the Seller to Buyer's facility or delivery location stated on the face of this purchase order, provided such loss, damage, or destruction is not attributable to Buyer's gross negligence.
7. Buyer shall have a reasonable period after delivery, but in no event, less than ten working days, to inspect the goods and notify the Seller in writing of any nonconformity.
8. Seller expressly warrants full and complete title to the goods subject to this contract which includes a warranty of good title, right to transfer good title, delivery free from any and all security interests, liens, charges encumbrances, and the like, whether voluntary or involuntary in character; the goods shall be free of any and all claims or clouds on title that may be reasonably asserted by third parties; and, no third party has any rightful claim on the goods by way of patent or trademark infringement. The goods sold pursuant to this purchase order are warranted to conform to the specifications submitted by Buyer. Goods sold pursuant to this purchase order are warranted to be sold at as low a price as the Seller now charges any other customer purchasing like quality and quantity of goods. The goods sold pursuant to this purchase order are also warranted to arrive at the delivery location in good conditions free of any defects attributable to transportation. The goods sold pursuant to this purchase order are warranted to conform to any performance and durability requirements specified by Buyer and are of a merchantable quality.
9. It is understood that the goods subject to this contract are required by Buyer to meet any specific needs and uses specified on the face of this purchase order or in a document incorporated by reference. It is further

understood that failure of the Seller to perform as agreed is likely to result in additional liabilities, such as the inability or failure of Buyer to perform other contracts, and Seller assumes responsibility for consequential damages which may proximately result from its failure of performance hereunder. Buyer shall also have the right to deduct all of any part of damages resulting from any breach of this purchase order from any part of the purchase price still due under this purchase order. Such deduction shall be made by Buyer and is understood to be made without prejudice in any way to other rights of Buyer and with full reservation of all other rights incident to the alleged breach.

10. Either party may assign its rights or delegate its duties under this purchase order in whole or in part. No delegation of performance, however, shall relieve the party delegating any duty to perform of any liability for a breach.
11. Seller agrees to defend, indemnify, and hold Buyer harmless in the event of any suit for breach of warranty or under any claim of infringement relating to the goods. The Seller will defend against any such suits or claims at its own expense. Buyer agrees to notify the Seller of such suit or claim and to surrender control of such action to the Seller. Any judgment or settlement shall be paid entirely by the Seller who shall not be entitled to any reimbursement from Buyer.
12. If a demand is made by either party for assurance of adequate performance, the party upon whom demand is made shall respond in a form adequate to the demanding party within seven (7) business days of receipt of such demand. Failure to so respond within the time set forth will constitute a repudiation.
13. Remedies conferred on Buyer by this purchase order are in addition to all remedies available under the Uniform Commercial Code and are cumulative with all other rights accorded under the law or in equity. Such rights, moreover, shall in no way impair the rights and remedies of Buyer incident to any obligation, collateral or ancillary to this purchase order.
14. In the event the Seller shall notify Buyer of its inability to perform or shall breach this contract in a manner that warrants Buyer's exercise of a right to cover and purchase under the Uniform Commercial Code or to contract to purchase substitute goods, it is agreed that Buyer shall have the right in good faith to purchase goods of the same or similar nature, quality and quantity in substitution for all or any part of the goods due from the Seller under this purchase order.

15. Seller hereby represents that at the time of the acceptance of this purchase order it is not insolvent within the meaning of the Uniform Commercial Code or the Bankruptcy Laws of the United States and is fully capable of performing this purchase order in a timely fashion.
16. The terms, rights and obligation under this contract shall be construed under the laws of the State of _____.
17. In the event that this purchase order relates to goods which are to be utilized by Buyer as part of performance by Buyer of a government contract or any contract subject to federal or state monitoring compliance mandates, Seller agrees to comply fully with applicable federal and state laws and regulations, including but not limited to laws relating to Equal Employment Opportunity, Veterans Employment, Employment of the Handicapped, affirmative action, minority contractors, utilization of small business and disadvantages business concerns, and to provide such certifications and compliance assurances that may from time to time be required by the government or Buyer. Additional requirements may be appended to this purchase order and, if so, are deemed incorporated as part of the purchase order. In the event of any violation of any such law or regulation by Seller, Seller agrees to indemnify, save and hold Buyer harmless from any damages, losses, fines, proceedings and other injuries expenses (including attorneys fees) relating to or arising out of such violation or noncompliance.
18. The parties intend this purchase order as a final expression of their agreement on all terms here set forth and as a complete and exclusive statement of the terms of agreement. This purchase order supersedes not only all prior agreements, but also any oral agreements made contemporaneously with Sellers' acceptance of this purchase order. Any such communications shall not be used to supplement, explain or contradict the terms of this purchase order.
19. To the full extent permitted by law, Seller voluntarily waives and relinquishes any right to claim a mechanics lien or other statutory or common law lien on any real property, or the project on which these goods may be used.

Criteria For Evaluating Qualifications of Bidders

Objective Criteria Intention

The intention of the Objective Criteria that is included in the specifications of this project is to assure that the awarding authority will secure the "lowest responsible and qualified bidder" who has the ability and capacity to successfully complete the project.

Objective Criteria For Evaluating Qualifications of Bidders
The Bidder Must:

1. have on its payroll or must be able to prove that it customarily employs supervisory personnel of the type qualified to perform the kind of work called for in the bid specifications.
2. demonstrate to the satisfaction of the awarding authority that it possesses the ability and capacity to successfully complete the project. If the bidder has satisfactorily performed work of similar size, scope and comparable dollar value to the kind called for in the bid specifications continuously during the past three years, the bidder shall be deemed qualified for the purpose of this paragraph. *
3. own or possess rented or leased equipment of the type customarily required by contractors in the performance of contract work and that such equipment, if needed, is available for the contract bid on.
4. have purchased materials over the past three years from suppliers who customarily sell the same materials in like quantity and quality to contractors.
5. be financially responsible to perform the work bid on.
6. be able to furnish references from owners indicating that it has satisfactorily completed contract work of the nature bid on and in a timely manner, complete with exonerating evidence where delays were evident.
7. be able to demonstrate expertise in the work required on the project either through itself or at a minimum at least one supervisory employee (on its payroll).
8. have adequate physical facilities to perform the work.
9. demonstrate to the satisfaction of the awarding authority that there exists a previous record of a harmonious relationship with its subcontractors.

** If the bidder does not have three years as called for, then the bidder must include in the bidder's qualifications all the facts that demonstrate the bidder's ability and qualifications of past performance.*

CHAPTER **THREE**

Supervision of Students and The Law:
A Primer on Negligence

■ by Charles J. Russo

One of the major challenges confronting school business officials, teachers, and building level administrators is how to maintain a safe learning environment for students. Whether students are sitting in class, playing in school yards, or participating in extracurricular activities, educators run the risk of liability for injuries suffered by children if they breach their legal duty to protect the youngsters in their care from unreasonable risks of harm. The virtual impossibility of insulating educators and their school systems from all liability notwithstanding, awareness of the principles constituting the legal duty to supervise students properly and the defenses to negligence can go a long way toward protecting a school and its personnel.

In order to provide educators with a basic understanding of their legal responsibilities when supervising students, this chapter is divided into two major sections. The first part provides an overview of the elements of negligence that an injured party must be able to prove in order to hold an educator or school system legally accountable. The second section of this chapter reviews the basic defenses to negligence: immunity, comparative/contributory negligence, and assumption of risk.

Elements of Negligence

The four elements of negligence, sometimes, presented in a different sequence, are duty and the related principle of foreseeability, breach, injury, and causation. Insofar as liability often depend upon the facts in a given situation, when a

mishap occurs it is imperative that educators recognize how crucial it is to record all of the events that took place as quickly as possible. If, and when, an accident does take place, administrators should do all that they can to ensure that any and all staff members involved in the incident file an accident report before leaving school that day. Given the fact-specific nature of negligence, the practice of filling a report out immediately cannot be over stressed before entering into a substantive discussion of the topic because doing so can ensure that the events are still fresh in an individual's mind and can be recorded more accurately. The contents of an accident report, even though not always dispositive, can play a major role in determining a liability for an injury since they can assist in demonstrating that school officials acted reasonably in response to the incident.

Duty

An old adage in the law of negligence maintains "no relationship, no duty." In other words, unless one person has a legal relationship to another (and moral considerations aside), there is no legal duty to help a stranger. As such, it is important to recognize that an educator who is acting within the scope of his or her duties whether in the classroom, at another school in the system, or out of the building or district at a professional development workshop, or as part of an extracurricular activity has a duty to assist all children in the group even if the individual teacher does not know a particular child personally. This duty arises based on the educator's legal relationship with the school district as a whole and is not limited to children (or others) from the building where the teacher works. For example, a kindergarten teacher who is in the district's high school on official business cannot walk by an otherwise empty classroom where two large high school students are fighting and be thankful that he or she does not teach at that level. As is explored below, the teacher has a duty to do something.

Once the law recognizes the existence of a legal relationship, an educator has the duty to anticipate reasonably foreseeable injuries or risks and take reasonable steps to try to protect students from harm.[1] A case from Maryland, *Hammond v. Board of Education of Carroll County*,[2] reached an interesting result on the issue of duty where a sixteen-year-old female high school football player suffered a ruptured spleen and other internal injuries when she was tackled cleanly by a player from the other team at a practice scrimmage. An appellate court expressed its concern over the seriousness of the young woman's injuries. Yet, the court affirmed that the school district did not have a duty to warn the student or her

mother of the obvious risks posed by her voluntary participation in interscholastic football because the risk of injury was normal and obvious.

A highly flexible concept that varies based on the age and physical condition of students as well as the degree of danger inherent in a situation, this duty does not expect teachers to foresee all harm that might befall children. Rather, educators are responsible for only those mishaps that can reasonably be anticipated or of which they are actually aware. In one case from New York, *Tomlinson v. Board of Education of Elmira*,[3] the parents of a sixth grader who was injured when a classmate pulled his chair out from under him as he went to sit down unsuccessfully sued the school system. The court ruled that since the educators involved had no reason to expect that the second student would pull the chair away, this was an injury that the school could not have realistically anticipated or prevented. However, if the student who pulled the chair out had done so previously, or others had already done so on other occasions, then the school system would have been on notice and may have been held accountable. Aware of the possible risk of injury, many school systems have moved away from individual chairs in cafeterias and have purchased tables with fold up seating that is attached to the body of the table.

In light of the move toward the full inclusion of students with disabilities, educators should be aware that the courts typically have imposed a higher duty of care on teachers of children with special needs. For example, if a child is wheelchair bound, then teachers and librarians will have to make sure that books and other objects are placed within a child's reach. Educators, therefore, should be especially vigilant to make school buildings more readily accessible to all students. Thus, while foreseeability requires some thought, it should not impose any significant increase in the level of preparation that most educators already apply.[4]

Breach

Two important considerations must be taken into account when inquiring into whether an educator has acted appropriately or has breached his or her duty of care. The first relates to how the educator has performed, or not performed, his or her duty. More specifically, an educator can breach his duty in one of three ways. First, as in the example of the teacher who walked by a classroom where two students were fighting but did not stop, an educator can breach her duty by not acting when she has a duty to act (legally this is referred to as nonfeasance). Even though there is no obligation that a teacher place herself or others at risk

of injury, the teacher had a responsibility to do something reasonable under the circumstances. At the very least, she should not have kept walking down the hall but could have ordered the students to stop fighting, could have called for help, or could have sent for assistance. A second way of breaching a duty takes place when a teacher acts improperly or erroneously; this is known as misfeasance. As an alternative to the kindergarten teacher with little or no experience dealing with large students who were fighting, imagine a situation where a high school football coach was visiting an elementary school. If the coach happened upon two small second graders in the hallway who were arguing and started pushing them apart in the same way as he might separate two of his players, he risks liability for misfeasance. Admittedly, an educator can use reasonable force to defend himself or other from harm, but, under these circumstances, the coach should have used techniques better suited to dealing with second graders. Third, a teacher who acts with an illegal or improper motive that is beyond the scope of his employment has engaged in malfeasance and places himself at risk. Unfortunately, malfeasance has reared its ugly head in the significant number cases of sexual harassment and or abuse of students by school personnel that have been litigated in recent years. Educator misbehavior of this type can also be considered an intentional tort against the student (or other individual) and negligent supervision on the part of the school system if it had knowledge of the teacher's behavior and failed to take corrective action.[5]

The second major consideration under breach is the appropriate standard of care that educators must follow. In determining whether an individual has applied the correct degree of care, the courts have adopted a standard of reasonableness. A court typically will instruct the jury to consider an educator's behavior in light of the legal fiction known as the reasonable person, also known as the reasonably prudent person. Although the courts have ordinarily stopped short of establishing a clear hierarchy, based on education and years of experience working with children, a reasonable teacher is likely to be held to a higher standard of care than a reasonable person but not to the same level as a reasonable parent. That is, the courts have tried to create an objective standard that holds a teacher accountable to perform at the same level of care that a reasonably prudent professional of similar education and background would or should have acted. This degree of care is ordinarily based on the equivalent age, training, education, experience, maturity, and other relevant characteristics for an educator. Under this standard, a first year teacher may not be held to the same level of expertise as a colleague with ten years of experience.

Deciding which standard applies in a school setting was illustrated as one of two major points in a well known case from New York City, *Benitez v. New York City Board of Education*.[6] A star high school football player who was being considered for an athletic scholarship to college broke his neck while correctly executing a block and the coach appealed a jury verdict that found him liable for the student's injury. The state's high court reversed in favor of the coach when it found that he should not have been held to the same standard of care as a reasonably prudent parent. Instead, the court followed the general rule and held that since the student-athlete voluntarily participated in the game, the coach satisfied the less demanding ordinarily reasonable care standard. However, bearing in mind that the courts tend to impose a greater standard of care based on a child's age and physical condition, a school system is typically expected to provide closer supervision for younger and disabled students.

Even where a teachers have liability insurance, either as a benefit of membership in a professional association or through individual policies, to cover themselves for acts of negligence, most companies void the coverage of educators who act beyond the scope of their legal authority. Whether a school would be liable for a teacher's malfeasance would hinge largely upon whether the educator's actions were foreseeable. Certainly, an educator with a history of problems supervising students places a school system at greater risk of liability such that administrators should more closely critically evaluate such an individual.

Injury

In order for an aggrieved party to prevail, an injury must be one for which compensation can be awarded. This is especially crucial in light of the fact that most, if not all, attorneys who deal with the negligence work on a contingency fee basis. Put another way, an attorney who specializes in negligence gets paid, if at all, out of the proceeds of a jury award or a settlement agreement. If, for example, a student who was running through a school cafeteria fell on milk that had been spilled on the cafeteria floor only moments earlier, three factors need to be examined at this point. The first question is whether the school had a duty to keep the floor safe and clean. Assuming the obvious, that the school had such a duty, the related question of foreseeability comes into play. For the sake of discussion (and this is a big assumption), assume that the school should have foreseen this incident and should have had it cleaned up immediately. Second, the issue of the school's duty and possible breach must be answered. The third con-

cern is the nature of the child's injuries. If the child's only "injury" was a wet pair of pants, then it is highly unlikely that his claim will proceed. However, if the child broke his leg upon falling, then there is a greater likelihood that this may be deemed an injury for which compensation can be awarded.

Causation

The final element in establishing liability for negligence is that school personnel must be the legal, or proximate cause, of the injury brought about by the breach. In other words, imagine a situation developing as a temporal sequence of events. The last person or persons in a chain of events who could have taken steps to prevent an injury from occurring is typically considered the legal cause. To continue the example of the spilled milk from above, liability issues for the school and other personnel aside, consider a teacher who was standing at the entrance to the cafeteria and urged the student to run to get in line. If the student fell, then the teacher is likely to share in liability as the proximate cause of the child's injury. Conversely, if the same teacher had warned the child and the youngster obeyed, took two steps, and again began to run, then unless the child is known for such behavior, then the teacher is not likely to be held accountable for the student's injury.

Defenses

Even if an injured party has established that the elements of negligence are present, educators and school systems have three primary defenses available to limit or eliminate liability. The defenses recognize that even though schools are charged with the duty of caring for children, they cannot be held accountable for every conceivable harm that befalls students during the academic day.

Immunity

Perhaps the most frequently applied defense used by school systems has been governmental (also commonly referred to as statutory) immunity. Immunity is based on the common law principle (referring to judge made law based on precedent rather than legislative enactments) that the government, in and through its various branches and departments, cannot be held liable for the tortious acts of its officers or employees. A related concept, charitable immunity, has been applied to not-for-profit organizations such as non-public schools and

hospitals. In recent years a growing number of jurisdictions have greatly reduced or eliminated the scope of both governmental and charitable immunity. An important word of causation to teachers and other school personnel including school business officials: unless state law has specifically extended the scope of immunity, these professionals are not afforded the same degree of protection as their school systems.

Contributory/Comparative Negligence

Both contributory and comparative negligence are promised upon a person's having played a part in causing his or her injury. These similar sounding defenses, which apply in an almost equal number of jurisdictions, produce very different results. Under contributory negligence, a party whose actions led to the cause of his or her injury is precluded from recovering for the harm. Yet, bearing in mind that because many children are injured in accidents at school, the courts do not hold students to the same standard of care as adults. Rather, the courts take a child's age and physical condition into account when a defense of comparative negligence is raised. As a general rule, courts have held that children under the age of seven are incapable of negligence concerning their own behavior while those over the age of fourteen may be accountable on a case by case basis. A recent case from Oklahoma, *Lewis v. Independent School District No. 10 of Pottawatomie County*[7] illustrated the special problems posed by children between the ages of seven and fourteen. The mother of a ten-year old child who was struck in the eye while voluntarily participating in a game of field hockey appealed after a school district successfully asserted the defense of contributory negligence. The court concluded that the child was not capable of contributory negligence by playing field hockey unless he appreciated the danger that his borderline hemophilia presented. The case was remanded for trial and there are no further recorded references to its outcome.

In recent years a growing number of jurisdictions have moved toward comparative negligence wherein the court directs a jury to apportion fault between the parties. As such, an injured party's award may be reduced by the degree to which he or she played a part in causing the injury. A recent example of comparative negligence occurred in a case from New York City, *Giraldez v. City of New York*,[8] where a jury found that a pedestrian who fractured his ankle upon tripping and falling on a depression on the sidewalk in front of a public school was forty percent at fault. The court affirmed that based on the pedestrian's culpable conduct, the city was liable for only sixty percent of his damages award.

Due to the fact that states vary as to whether they follow contributory or comparative negligence, school business officals and other educational leaders would be well advised to check their own state's laws in order that they might develop appropriate policies to protect their school systems.

Assumption of Risk

Assumption of risk is also based on comparative fault. This defense can reduce an injured party's recovery in proportion to the degree to which his or her culpable conduct contributed to an accident if the individual voluntarily exposed himself or herself to a known and appreciated risk of harm. As noted in *Benitez*, discussed earlier, this defense is frequently applied in cases where student-athletes are hurt while participating in sports. In *Benitez*, the court held that since the student-athlete was a senior, he voluntarily and knowingly assumed the risk of the injury in the game where he was not under any inherent compulsion to play football. Similarly, as noted in *Hammond*, the Maryland court, although sympathetic to the female football player's injuries, also applied the defense of assumption of risk in finding in favor of the school system.[9]

Conclusion

In light of the great benefit that can be gained from a better understanding of the basic elements of negligence, two recommendations are made. First, insofar as the rules governing negligence, and especially those controlling the defenses, vary from one jurisdiction to another, school business officials and others charged with the responsibility of risk management would be wise to consult with an attorney knowledgeable from their jurisdiction who specializes in education law to find out the parameters of their legal protection. Any policies should be up-to-date and will accurately reflect that status of the law; and will afford the system with the best protection possible. Second, districts would be well advised to provide school personnel with annual workshops on negligence. If there is any truth to the adage that "knowledge is power," the more educational personnel know about preventing negligence, the safer the schools will be.

Notes

1 For interesting case on foreseeability, see e.g., *Allison v. Field Local Sch. Dist.*, 553 N.E. 2d 1383 (Ohio Ct. App. 1990) (finding that a school district was not liable for injuries sustained by a first grade student who was struck in the eye by a dirt-ball thrown by a fourth grader as the action of the older child was not foreseeable); *Duncan v. Hampton County Sch. Dist. #2*, 517 S.E.2d 449 (S.C. Ct. App. 1999) (holding a school district liable for gross negligence where a classmate sexually assaulted a female student with a mental disability where school officials were aware of another sexual incident that had occurred two weeks earlier).

2 639 A.2d (Md. Ct. Spec. App. 1994).

3 583 N.Y.S. 2d 664 (N.Y. App Div 1992).

4 For a good discussion of what needs to be done when supervising students with disabilities, see R. D. Mawdsley, "Standard of Care and Students with Disabilities," *Education Law Reporter*.

5 For such a case see *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (holding that a school district was not liable under Title IX for a male teacher's sexual harassment of a female student where officials did not have actual notice of his misbehavior and failed to take corrective action).

6 583 N.Y.S. 2d (N.Y, 1989). *See also Bell v. Ayio*, 731 So. 2d 893 (la. Ct. App. 1998) (holding a school bus driver, who removed two students from a bus after one threatened the other with physical violence, fifteen percent liable for the injuries that the victim subsequently sustained while finding the attacking student liable for the remaining eighty-five percent).

7 808 P.2d 710 (Okl. Ct. App. 1991).

8 625 N.Y.S.2d 517 (N.Y. App. Div. 1995).

9 *See also Fisher v. Syosset Cent. Sch. Dist.*, 694 N.Y.S.2d 691 (N.Y. App. Div. 1999) (affirming that a cheerleader who was injured during practice could not recover from her school district since she assumed the risks of her sport and was practicing voluntarily under the supervision of her coach).

CHAPTER FOUR

Privatization in K-12 Public Education

■ by Frank Brown & Richard C. Hunter

The move to privatize public elementary and secondary schools is being undertaken in an attempt to improve education by injecting market incentives into the system. In America, in order of priority, there are political (and ideological), economic, and educational "markets." Politics trumps these markets, as it defines them and other areas of interest. Educational reform is in reality a metaphor for political, economic, and educational agendas. At first glance, these agendas should be obvious to the casual observer of education. However, due to the complexity and confluence of issues involved, the goals of privatization in education become muddled. Other common metaphors for privatization of education are family choice, deregulation, and democratic values. Even so, the one thing that is clear about low academic productivity in America's public schools is that most poorly educated children are located in poor neighborhoods and communities. Further, the majority of poorly performing schools are located in urban communities where most students come from racial and ethnic minority households. These residents possess less economic and political power than those who live outside of these communities. However, many educational reformers proposing radical solutions to the problems of urban schools are traditionally the political opponents, if not the enemies, of residents in these communities.

The "political market" is at the top of all markets influencing education. Yet, the politics of education change as individuals in the political arena change. In educational politics, some players have the power to wield influence over other players. Educational politics determine whether schools have site-based management programs and whether such practices as vouchers, charter schools, home schools,

private schools, and state takeovers of failed schools are attempted. In this arena the key players in public school privatization are school board members, business leaders, clergy, district employees, parents, students, and state legislatures.

Other labels related to privatization, such as family choice, charter schools, school vouchers, "opportunity scholarships," "public school academies," "break-the-mold" schools, "new schools," "reconstituted schools," deregulation, private money for public schools, and tuition tax credits are often used. Before examining the politics of privatization, this chapter reviews its implementation, deregulation, and other school choice experiments.

Today, public school transformation by the use of for-profit companies is at a standstill. In 1992, the Edison Project, a for-profit company, raised $100 million to operate twenty-five schools and still has not been able to make a profit. In 1999, renamed Edison Schools, the group raised $122 million in an initial stock offering on the New York Exchange.[1] Christopher Whittle began the Edison Project in 1991 with the intent of operating hundreds of profit making schools but quickly dropped that plan in lieu of managing public schools for a profit. The company manages only about half the number of sites it says it needs to keep its central promise to give public school children an education, surpass what they now receive, and earn a profit. Edison operates in eight states and thirteen cities. Most of the sites are part of larger school systems, but the company would like to create independent charter public schools.

There are 1,700 charter schools in thirty-four states, the District of Columbia, and Puerto Rico enrolling 350,000 students.[2] Advantage Schools, a Boston based education management company, operates schools in several states but has not generated a profit.[3] For-profit companies manage about ten percent of the nation's 1,700 charter schools. Advantage's contracts calls for seventy-eight percent of the school's funds from per-pupil aid at each school site, Advantage gets fifteen percent of the funds for services provided and a management fee of seven percent. But, Advantage must cover any school deficits. Advantage saves money by replicating the same academic program for most of its schools.[4] In 1995 the National Heritage Academies began operating one of the largest for-profit education management companies managing charter schools. The Grand Rapids, Michigan, company operates twenty-two charter schools with about 8,000 students in Michigan and North Carolina, but has yet to turn a profit.[5] About 1,700 charter schools out of 85,000 public schools are in operation nationwide and most are small and aimed at disadvantaged elementary and middle school students. Federal support to aid the establishment of charter schools rose from $5 million in 1995 to $51 million in 1997.

Tesseract Group, a for-profit educational management company, sold two of its Arizona charter schools because it was losing money on the venture.[6] In the 1990s Tesseract, then known as Educational Alternatives, Inc. managed public schools in Dade County, Florida, and Baltimore, Maryland and was employed to manage the Hartford, Connecticut, school system. The Dade County and Baltimore contracts were terminated and Tesseract was dismissed by the Hartford School District. By February, 2000, Tesseract's stock was dropped from the NASDAQ Stock Market because its assets dropped below the minimum required, in March Tesseract defaulted on a $5 million loan, and may have to file for bankruptcy. Another for-profit company, Nobel Learning Communities, Inc. of Media, Pennsylvania, operates 151 private and public charter schools in sixteen states and a pre-school in Tennessee. Nobel is known for operating private preschools and elementary schools in suburbs around the country.

Arizona provides a good example of how flexible state statutes are on charter schools:[7]

- A charter holder can open multiple campuses. Fifty-four holders ran multiple sites with the three largest holding forty-one campuses.
- Private schools, including non-profits, can open or convert to charter schools. In 1999, nine of ten charter operators with five or more schools were for for-profit businesses. Some had ties with religious organizations.
- School districts may charter schools in other school districts. About seventy of the ninety-five school district-sponsored charter schools operate in the home school district.

Vouchers are used in Cleveland, Milwaukee, and Florida.[8] Parents in these locations may send eligible students to private schools, including religious schools, with taxpayer-financed voucher programs. Eligible students must come from low-income families in Cleveland and Milwaukee and from low performing public schools in Florida, which has the only statewide voucher program. Wisconsin has established the nation's first voucher system for inner city children in Milwaukee, accommodating 1.5 percent of the district's student population. A similar state voucher program for a small number of inner city students in Cleveland enrolls approximately 1,500 voucher choice students in twenty-three private schools.[9] In 1998 the Supreme Court of Wisconsin ruled that religious school choice is constitutional under the public financed voucher

program.[10] In Arizona, Iowa, Illinois, and Minnesota, families may benefit from tax credits to help cover the costs of private education.

In addition to state funded voucher programs for public school students, private individuals and organizations are providing vouchers. New York City's Mayor Giuliani, with the aid of private foundations, is supporting the attendance of 1,300 low performing students from the public schools to attend Catholic schools in the city where the average tuition is between $1,700 and $1,800 per year. Educational Alternatives, Inc., a for-profit educational management company, wants to use private money from private developers in Arizona to operate publicly funded schools in buildings constructed with private funds from housing developers.

Private individuals and foundations are also funding vouchers for children enrolled in public schools to attend private schools. Virginia Gilder, a multimillionaire from New York City, tried to improve education at Giffen Memorial Elementary School in Albany, New York, the lowest performing school in the district, by setting aside $1 million to offer up to $2,000 to any Giffen student who wished to attend a private school. About 105 students applied for the offer, but only eighty-three accepted it and attended the nearest local Catholic school. In the San Antonio, Texas, Independent School District, a system of 61,000 students, of whom eighty-one percent are Hispanic and seven percent are white, the Children's Educational Opportunity Foundation provided scholarships that covered half the tuition cost to enroll in private schools, with a maximum of $750 for children from low-income families. This program began in 1992 and was evaluated for the first four years. A study of the program revealed that the choosing parents were more educated and wealthier. The children had higher standardized test scores and were more likely to be white. The dropout rate was fifty percent, due mainly to the students' not being able to get into the private schools of choice.

Privatization of charter schools and some choice plans may face legal difficulties. For example, Wilkinsburg, Pennsylvania, a suburb of Pittsburgh, allows the for-profit company Alternative Public Schools of Nashville, Tennessee, to operate one of its elementary schools. A local judge ruled that the state passage of a charter school law gave districts an option for turning over failing public schools to non-profit charter groups, but the charter law did not authorize the use of for-profit companies. In Detroit, city officials lost a lawsuit to close the privately run Baron's Academy which the Romulus Public District, located west of the city, opened in 1996.[11] The academy enrolls about 250 students. State

lawmakers are debating whether a public school district can open a school inside another public school district. Michigan Governor Engler backed the Romulus move into Detroit to promote competition. In anger, the Detroit School Board voted against joining a partnership with the mayor and governor in reforming the city schools. A 1996 Michigan statute allows public school choice across district lines, and approximately 12,000 students (out of 1.6 million K-12 students in the state) cross district lines to attend school.[12] About 225 districts participate in the voluntary program. Most of the students transferring are from white, wealthy, high achieving districts that border cities that have not opened their schools to inner city students. Minnesota, on the other hand, mandated inter-district transfers for the entire state with approximately 22,000 students participating. Delaware, with 108,000 K-12 students, received about 8,000 applications for its choice plan, but most are intra-district transfers.

In Milwaukee, a 103,000-student district, all public high schools are allowed to set admission standards and choose among students in their district based on academic records, attendance, behavior, and compatibility with a school's academic focus. The district is eighty percent nonwhite and sixty percent African-American. The NAACP and the Urban League oppose this plan as an attempt to re-segregate schools by race and class.

Sylvan Learning Systems, Inc., a New Jersey-based for-profit educational organization, is the largest provider of contract services to schools. Sylvan is unique among instructional private services because it seeks to provide supplemental instruction only. It provides schools with remedial and special education services that are funded by federal and state sources and tutorial services mainly to students in wealthy public school districts. Sylvan has contracts in several states and the District of Columbia and is listed on the NASDAQ Stock Market. Sylvan is consistently profitable, but its stock has performed poorly recently.

At the federal level, Congressional school choice advocates are shifting their campaign to the tax code.[13] They are seeking tax-free savings accounts for individuals that would allow the money in the accounts to be spent on tuition at private and religious K-12 schools. These accounts would allow parents, grandparents, and scholarship sponsors to deposit up to $2,000 free of federal income tax into an "A+" account. Withdrawals could go to private or religious school tuition. Some in Congress are also proposing a voucher program for students in the Washington, D.C., Public School District similar to voucher plans in Milwaukee and Cleveland for poor inner city children.

President Clinton has threatened to veto all voucher proposals. In August,

1997, standing on the Capitol steps at a news conference with 100 children from Washington, D.C., Senate Majority Leader Trent Lott and then-House Speaker Newt Gingrich promoted a voucher program for D.C. schools. The District's non-voting delegate to Congress, Eleanor Holmes Norton, opposed the voucher program. Former President George Bush proposed a similar plan in 1991, and currently voucher bills are under review in Congress where they are being attached to major appropriations bills. However, there are few private schools in the Washington area that will enroll students for the $2,000 voucher included in the bill.[14]

The choice movement also includes the management of public schools by private companies in which school districts employ private companies to manage their schools. Perhaps the most significant example comes from Minneapolis, the incubation center for modern public school choice programs. In addition to establishing choice programs, the Minneapolis School District hired a private company to serve as the CEO or superintendent of the district under a performance contract for more than four years. At the end of the 1997 school year, the Minneapolis School Board ended its contract to manage public schools with the Public Strategies Group, Inc., a private company, after fifty-two months, a little more than four years. The company claimed it turned the school system around using pay-for-performance contracts, but there is no confirmation of this claim. It is interesting to note that the company expended a tremendous amount of energy to change the schools with little measurable results.

Choice programs have strong support from many wealthy individuals and business leaders. Yet, wealthy school districts are often opposed to choice plans in their districts. In general, school districts are not required to participate in a state's school choice plan by accepting students who are not residents of their district. Wealthy suburban public school districts often do not participate; some even place a "bounty" on non-residents who fraudulently enroll in their schools. Some parents have been sent to jail for their unlawful actions. This situation poses a problem for choice programs trying to enroll low achieving students into high achieving public schools. For example, a Cleveland mother was jailed for enrolling her son in a suburban school. An Ohio statute makes illegal school registration a misdemeanor punishable by up to thirty days in jail, a $500 fine, and tuition reimbursement for fraudulently enrolling a child in a neighboring school district.

For parents who cannot exercise the choice of moving from a low achieving school or district to a higher achieving school or district, the next best option is

to pour private money into the child's public school. This is an age-old option practiced by schools all over America that gained national attention recently. The parents at P.S. 41, located in the heart of Greenwich Village in New York City, raised $46,000 to cover the salary of a teacher the district could not keep because of a budget shortfall. Rudy Crew, then Chancellor, refused to accept the money because of the principle of equity within the school system. He ordered the district superintendent to find $46,000 for the teacher's salary in his budget, at least for that year, in order not to disrupt the children's education.[15]

Parents at a Brooklyn elementary school fund three teaching positions per year with private money. Schools are also establishing private foundations for improvement beyond what the general public has agreed to support.[16] At a public elementary school in Park Slope, Brooklyn, the parents raise more than $100,000 a year to pay the salaries of two art teachers and a science teacher. These teachers are referred to as "consultants" because they are hired outside of the Board of Education. In New Jersey, parents in more than fifty elementary schools have established private foundations to support their schools. In Detroit, each student at a public elementary school is charged a seventy-five dollar fee. This fee is waived if the students can demonstrate extreme hardship, but even the poorest tend to find the money. This raises $30,000 per year. Actions like this are happening across the country. The PTA of the Greenwich Village school, upon being informed by the District 2 Superintendent that his budget required he let one popular teacher go, raised the replacement funds almost overnight to retain the teacher and keep class size down.[17] The PTA was willing to go to court if the school district refused to accept its offer. If this is allowed for wealthy neighborhoods, the gap between the rich and poor will widen.

Privatization implies that under capitalism, maximum output and efficiency by an organization can best be accomplished if there is an opportunity to make a profit, and private vendors should be encouraged to enter the K-12 education market with the profit motive in mind. This profit motive should be to society's advantage whether a school is operated with private funds, with state funds via a state voucher, or a performance contract with a local public school system because it increases competition and academic achievement for students. Competition in education is seen as the greater good. But the history of "markets" in education for profit making is not always positive.[18] Education is getting more political play because of its appeal to the politically powerful aging baby boomers who have made education a priority issue.[19]

This country began schooling children through privately administered, non-

profit schools and for-profit schools. As late as the 1920s three models co-existed in America: public schools, non-profit religious and independent schools, and a few for-profit independent schools.[20] In the 1925 Oregon case, *Pierce v. Society of Sisters*,[21] the Supreme Court held that parents could send their children to the school of their choice, overruling an Oregon statute that required all children to attend public schools only. A for-profit school and a non-profit religious school were defendants in the Oregon case. However, shortly after the 1925 decision, market conditions doomed all for-profit K-12 schools from the school business. Market incentives have spoken loud and clear: because of culture and tradition, for-profit schools do not exist in America or anywhere else in the world. Privately administered religious and independent schools are private but non-profit institutions. Several countries, notably Australia, Canada, France, and the Netherlands allow religious organizations to operate schools with public funds. However, these schools become *de facto* public schools and behave like public schools as they are required to operate under government regulations.

The inability of private vendors to enter the for-profit school business successfully has led many entrepreneurs to enter into contracts with public school systems to operate public schools for a fee (profit). Following the attempts of Educational Alternatives, Inc., later Tesseract Group, Inc., to operate public schools for a fee as outlined above, another vendor, the Edison Project, is picking up the for-profit mantle. The Edison Project has contracted to operate public schools in several school districts, with initial success in Wichita, Kansas, Boston, Massachusetts, Mount Clemens, Michigan, and Sherman, Texas.[22] Eugene C. Baten, who managed the Hartford public school contract for Educational Alternatives, Inc., commented on what went wrong with their efforts to operate the school system. He stated that educational organizations are complex and extremely political.[23] Private for-profit vendors contracting to provide schools with instructional services will need the same administrative and political skills as a principal or superintendent to be successful.[24]

Privatization also includes contracting out to a private vendor the operation of a public school in which the choice is made by the school system, not parents. Parents generally enroll their children in the same school, with the same teachers and schoolmates, regardless of who operates the school. Moreover, because of distance, money, peer pressure, and parental knowledge, school choice for the urban poor is more limited than for those who have the means to leave a district, enroll their children in private schools of choice, or secure special treatment for their children in neighborhood public schools. This inability of inner-

city parents to choose schools for their children is central to a discussion of privatization because most efforts at privatization involve children from urban communities with a high concentration of poor racial minorities.[25]

Closely allied with choice and privatization is deregulation of educational markets.[26] Deregulation is a term used by individuals from the business community to support privatization of education. However, if the educational market is deregulated, for-profit schools will compete with non-profit schools and public schools to increase competition and thereby increase effectiveness as claimed by choice advocates. Nevertheless, accountability standards must be met whether one operates a school, prison, hospital, or mail service. Business people also get excited about the possibility of making a profit out of the $350 billion spent annually on education,[27] of which about $30 billion goes to companies that supply schools with services. Contracted services include: computers (44.4 percent), transportation (40.7 percent), instructional equipment repair (35.4 percent), printing (32.7 percent), heating (32 percent), food (24.6 percent), and custodial services (10.4 percent).[28]

A small facet of choice movement is the use of publicly funded vouchers to allow children to attend schools of their choice. Vouchers are currently used to educate poor inner-city children in Milwaukee and Cleveland[29] and low performing schools statewide in Florida.[30] A small number of students (about 1500 in each city) are given vouchers to attend a private school of choice. In Cleveland, recipients may attend a private religious or sectarian school or a school in an adjoining public school system. A voucher is worth $3,600 per child in Milwaukee and $2,500 per child in Cleveland.[31] Voucher proposals were defeated by voters in Michigan, Oregon, Colorado and California.[32] The Milwaukee voucher program, now in its tenth year, has yet to yield positive results[33] and the state is withholding further mandated examination of the program until the year 2000. The Wisconsin Legislature expanded the Milwaukee Parental Choice Program and granted parents the right to use the state vouchers to include attendance at private religious schools. In terms of numbers, the Wisconsin program is authorized to expand from 1,500 to 15,000 students. The Cleveland voucher program is in its second year of operation.

The Supreme Court of Wisconsin reviewed the Milwaukee voucher program and approved the constitutionality of the program and the Supreme Court of the United States has refused to hear the case. In 1995, the Ohio legislature expanded the Cleveland program and permitted the use of vouchers at religious schools, but was ruled in violation of the Ohio constitution by the state's lower

courts. The Supreme Court of Ohio upheld the use of public school vouchers to attend religious school and during that process, students may continue to use these state vouchers to attend private religious schools. Most suburban school districts surrounding the Cleveland School District have refused to participate in the voucher program for low-income students from Cleveland.

The last major facet of choice is the use of charter schools to increase competition among schools. There are 1,700 charter schools with 350,000 students operating nationwide. Arizona, California, and North Carolina have the largest number of charter schools. This is another form of deregulation, another choice mechanism. Proponents of charter schools claim that choice through deregulation introduces market incentives into the system, producing greater efficiency (lower cost) and effectiveness (better student achievement).[34] Charter schools can be distinguished from other systemic school reforms such as magnet schools and site-based school management. Many states have statutes authorizing local school districts to grant parents or teachers the right to operate semi-autonomous public schools known as charter schools. This allows a public school to operate outside of some, but not all, traditional local and state guidelines. For example, California charter schools may employ non-certified teachers and handle their own finances. In theory, charter schools foster competition since they may accept students from anywhere within or outside a school district. But, to date, most charter schools are located in urban school districts and enroll students from poor minority neighborhoods. Getting parents in the "better" parts of the district to enroll their children in a charter school in a poor neighborhood is not an easy sell. It will take several years to evaluate the academic success of this relatively new reform. The first test should be how many charter schools remain in operation for five years or more.

Magnet schools are not charter schools. Rather, magnets are public schools or programs within schools with a singular curricular focus. Public schools with site-based management are schools where a school council typically consisting of teachers, parents, and administrators make decisions rather than granting sole authority to school principals. Several states have statutes mandating site-based school governance. In theory, this decision-making structure should improve the efficiency and effectiveness of public schools. There is, however, little empirical evidence to support the effectiveness of this decision-making structure.

Little evidence exists that privatization of instruction, deregulation, expanded school choice via charter schools, magnet schools, voucher programs or any of the other systemic reform efforts in education have enjoyed success.[35] Despite

evidence of a lack of academic success of schools operated by private vendors, opponents of privatization and related reforms should not declare victory because the movement is more political than educational.

A major study of charter schools is underway and some results are available, with more on the way.[36] The study will provide descriptive data of all 252 charter schools in operation in the 1995–96 school year, including site visits to forty-two charter schools in operation during the 1994–95 school year. A Michigan study of its charter schools shows them lagging behind public schools.[37] If the evaluation of privatization of education is measured by politics of the movement rather than students' achievement, the privatization movement would be declared a winner. Why and what criteria would be used to measure success for privatization as a political movement? The criteria include the use of symbols such as "privatization," "choice," "deregulation," and "market forces" to get politicians elected to office. These symbols get people elected to office, beginning with the election of Richard M. Nixon as president; symbolism continues to help elect Democrats and Republicans to political office.

Privatization as Political Symbolism

The genesis of the modern privatization movement was put in motion by the Supreme Court's decision in *Brown v. Board of Education*,[38] which declared that state-supported school segregation by race was unconstitutional. *Brown* motivated public school systems, first in the South and later in the North, to experiment with choice plans. The white backlash against school integration increased greatly after the passage of the 1964 Civil Rights Law, which gave the United States Justice Department the authority and resources to process through the federal courts compliance with *Brown* by offending school systems. Court-ordered school desegregation in the South and race riots in urban centers of the North combined to give conservative politicians a powerful weapon to attract conservative voters using the rhetoric of school "choice."

In 1968, Republican presidential candidate Richard Nixon proposed his Southern strategy to win the election. The strategy was later adopted by conservatives in both major political parties. However, many conservative Republicans went further by supporting a federal statute granting tax-exempt credits for tuition for children attending private schools, and they recommended federal vouchers to support private education. For many of the intended recipients, vouchers would help families offset the cost of enrolling their chil-

dren in private, often segregated, schools. In the North, tuition tax credits appealed to working class families with children in religious schools. Many candidates for political office who refused to use overt racial symbolisms lost national, state, and local elections.

The conservatives' current political ideas on education are a refinement of Richard Nixon's Southern strategy. "Family values" and the "American Dream" have been added to the symbolic list. With victories at every level of government, conservatives in Congress raised the ante in getting their thirty-year quest for government vouchers enacted by proposing a voucher program for the District of Columbia, where the federal government has control over public education.[39] They supported a $7 million plan for vouchers in District of Columbia schools which students could use to attend private, independent schools or religious schools. Even though the bill was defeated, then conservative presidential candidate Bob Dole took this fight national by endorsing tuition vouchers and visiting Milwaukee and Cleveland to praise their voucher programs.

At the state level, several governors are following the lead of Congressional conservatives. Former California Governor Pete Wilson pushed for "opportunity scholarships" (vouchers) of $4,500 for students from low-income families to use at public, religious or private schools. Governor William Weld of Massachusetts proposed a similar plan for low-income students in his state. Wisconsin Governor Tommy Thompson led the fight to get a voucher program approved for 1,500 low-income, mainly African-American students in the Milwaukee public schools to attend independent private schools.[40] He also secured private support from the wealthy, conservative Bradley Foundation[41] to employ lawyers to defend the program in court.[42] The Ohio governor followed the same pattern as the governor of Wisconsin in his state legislature by supporting a voucher plan for low-income students in Cleveland. It should be noted that Milwaukee and Cleveland have large Catholic communities, which could benefit from a voucher program to keep their financially needy urban schools in operation. Studies have shown, however, that the decline of Catholic schools in urban communities is due to market forces and the choice of individuals not to attend Catholic schools rather than doubts about their quality.[43]

The desire for privatization should not be based solely on benefits to students.[44] In general, politicians support programs that will get them elected, not always what is in the best interest of society or what is the fair and just thing to do. Anything that has value is political, and the politics of education precedes the art and science of education.

Using privatization to educate the urban poor is a risky enterprise[45] and is often a metaphor for other goals.[46] Former President Bush scored big political points when he proposed "GI Bill Opportunity Scholarships for Children" in 1992 to increase competition.[47] Coons and Sugarman, two Boalt Hall law professors at Berkeley and the fathers of voucher initiatives in California, feel that the country is not ready to accept racial and social class school integration.[48] They are convinced that white Americans will find ways to subvert efforts to racially integrate public schools and a public voucher to attend any school that the voucher will cover is the best option available for the urban poor to get a good education. They feel strongly that real educational accountability, as embodied in legal norms and public processes, is politically derived. By contrast, Coons and Sugarman feel that family choice (vouchers) would derive its controlling norm of behavior not from politics but from private preference. The authors of this chapter believe the two professors have sprung a trap for themselves when they insist that accountability and standards are politically derived but family choice purchased with a public voucher is not. This statement would invalidate the notion behind *Brown* and the equally successful Southern strategy adopted by Richard Nixon to reduce choices by minorities. On the other hand, we agree with their conclusion that, "While our national law forbids and sometimes prevents official segregation, it does not appear likely that affirmative integration will soon become either a constitutional norm or a social habit."[49] They also feel that vouchers may help minority children escape the negative effects of a school's hidden curriculum, assignments into lower-ability tracks and special education, and allow all students to better express their culture and diversity. This might be true if minority parents could find a school that will allow for such treatment, but good schools generally replicate traditional practices of race and social class separation and most families seek to place their children in good schools.

Opponents of privatization of public schools via charter schools, vouchers, and private management of public schools will help most inner city children improve their education because most low-income children will remain in public schools operated by public school administrators.[50] Further, low-income children attending privately administered charter schools or using vouchers to select schools will continue to attend schools with other low-income minority students in minimally funded schools. Privatization may also add new layers of bureaucracy.[51] State action and the Due Process Clause of the Fourteenth Amendment to the United States Constitution may complicate the process by providing all involved in the educational process rights not guaranteed to purely private insti-

tutions. This nation should be careful before the known is traded for the unknown without evaluation[52] and poor children should be protected from excessive experimentation.

It appears that privatization of American schools has more of a political motive than an educational motive. Yet, before one despairs about the future of inner-city children whose families lack the economic and political power to seriously impact the larger political system to improve schooling for their children, one should note that the world is changing. The old saying that "the solution to one problem creates another problem" is in operation. At the same time that former presidents Nixon and Reagan were implementing the Southern strategy, which included government vouchers and privatization of education, other changes were taking place that may reduce the importance of education to that approach over time. Presidents Nixon and Reagan also pleaded with other nations to open their markets to free trade, which would allow American companies to sell more products abroad. Free trade tends to benefit the less-developed nations compared to developed nations. The results were that America would experience a steady decline in its ability to compete in the global economy unless it admits a constant inflow of immigrants (legal or illegal) to perform low-wage jobs to keep the cost of production low in order to compete with cheaper labor markets.[53] Capital follows cheap labor to increase profits and market share. This economic movement has caused a corresponding decline in support for education. A full employment economy should not be confused with a healthy economy. Also, the United States will continue to see jobs leaving country for cheaper labor markets and more immigrants coming to fill cheap menial labor jobs. These new immigrants will lead to a more diverse population (even if not wanted), which should cause a major shift in the conservative strategy which seeks to rely more on the privatization of education. For children making excellent academic progress at wealthy public schools, parents are willing to pay up to $10,000 for the likes of the Sylvan Learning Centers to hone the skills of their already "A" students, or up to $150 per hour for expert tutors.[54] They want the best that money can buy and are willing to pay for these extra benefits for their children

K-12 schooling has both an educational and a political dimension. If privatization is assessed from an educational perspective, one would have to conclude that the experiment is just beginning and more data about privatization over a longer time span is needed before its success or failure can be judged. If privatization's impact on improving education for inner-city children is examined, the

experiment is a failure; most continue to be poorly educated. But, if privatization is viewed from a political perspective, the results are already in and it is a success. Political candidates who use this symbolism as a campaign strategy are almost always favored to win elections. Big business and suburban voters who feel that their taxes are paying for wasteful government programs favor privatization.[55] The major opponents of privatization are educators as represented by the two major teachers' unions, the National Education Association and the American Federation of Teachers, and parents of the poor. The unions receive lukewarm support for their position from their Democratic Party supporters. This is weak support when compared to the strong support for privatization by big business, several major private foundations, the leadership of the Republican Party, the conservative Christian Coalition, and scholars associated with well-funded conservative think tanks.

The major educational problem in America is still the lack of good schools for inner-city and other poor children. The solutions to this problem, as viewed by conservatives, are to deregulate, privatize, and restructure schools. Deregulation means parents would be able to select schools for their children from among public and private sector via increased choice and privatization. Restructuring means changing the way schools are managed and organized for instruction, which may be accomplished with charter schools, magnet schools, or site-based management. These are all cost-neutral proposals. Thus, many wealthy public school districts continue to spend in excess of $14,000 per pupil where the average teacher earns above $80,000 per year, compared to $6,000 per pupil for most inner city schools where the average teacher earns about $50,000 or less per year. It is still true that one gets what one pays for. Many public schools in wealthy communities are as good or better than the best private schools and parents get to deduct the cost (via property taxes) of these elite public schools from their state and federal income taxes. Even if America were not divided along racial and social class lines, politics would still play a significant role in the allocation of school resources for three reasons. First, education is a state function and not a federal function. Second, education is the largest component of local and state budgets. Third, educational resources are not evenly distributed throughout the population. Inner-city schools are generally under-funded when compared to suburban schools. Why are so many conservative politicians fighting hard to help inner-city children with state tuition vouchers, given that these same politicians do not favor giving their parents and communities their fair share of common resources? They do so because it is easier to get a program, such as privatization of public

schools, started and expanded later with a pilot program for the poor than it is to get such a program started to help the rich.

Educational and political leaders are much more likely to deal with the politics of the educational problem than with the problem itself. Presidents and governors say that specifying educational goals, restructuring schools, adopting parental choice programs, and increased privatization will solve the problem. Research on education tells a different story. Money to hire better teachers, a restriction on within-school discrimination via tracking, and a decrease in poverty schools are better ways to improve education. This is a message politicians do not wish to deal with. The first measure would force politicians to seek increased revenues through increased taxation or reduced services for other favored programs. The latter two could be achieved only with enormous political costs. Educational choice, via privatization or deregulation, and restructuring may lead to desirable objectives for improving the education of poor children, but the adoption of choice and restructuring as buzzwords to "fix" education have a political, not a pedagogical, genesis.

Critics claim that educational problems cannot be solved by throwing money at them and research in this area is difficult. It would be hard to create an environment in which poor children would receive their education in rich schools or for rich children to receive their education in poor schools. Therefore, it is almost impossible to assess the role of money on school outcomes, given current spending patterns between poor and rich schools. However, children of the poor should have the same opportunity as children of the rich to be disappointed in the failure of well-funded schools. Some of the behavior of our leaders is to be expected. The federal government is facing a budget deficit and money is needed for many favored programs, while most states find it difficult to balance their budgets.

The American experience is unique in the world and major changes will accelerate as we move into the next century. More people from diverse racial and cultural backgrounds will relocate across national boundaries, and the centers of economic power will shift to Asia. In just one decade or less, the Asian economy, excluding Japan, may be larger than the United States and Europe combined. In less than half a century, European Americans will constitute a minority. Therefore, America needs to develop all of its resources to compete economically in the new global economy and maintain political cohesion as we become more diverse. All children need the opportunity to develop their talents to the fullest, but proof is needed that privatization will be effective in educat-

ing all children, including inner-city children, before expanding this experiment. The use of children from inner-city communities as pawns to legitimize a program to benefit other groups crosses the line of acceptable politics. Privatization should be a means to better education for urban children, thereby improving the conditions for all Americans, not to enhance one's reputation with the powerful.[56]

Parental choice in selecting a school for one's children is not new in America. In 1925, the Supreme Court ruled that Oregon could constitutionally require all school age children to attend school, but could not compel parents to only enroll their children in public schools.[57] Parents have a constitutionally protected right to enroll their children in a public, religious or non-religious private school. *Pierce* was followed by a 1927 holding by the Court that the Territory of Hawaii could not require children to attend English-only language schools.[58] Moreover, in special cases, parents may elect to end their children's schooling at an earlier age, at the completion of grammar school if education interferes with their religious practice.[59] In *Wisconsin vs. Yoder*, the Court held that parents of the Amish faith might not be required to attend school after the completion of junior high school. Also, parents in all states may elect to teach their children at home instead of enrolling them in a school.[60] These are traditional choice options available to parents in educating their children. However, in response to the 1954 *Brown* decision to racially integrate America's public schools, white parents began to lobby politicians to find alternative schooling arrangements. These alternative arrangements include school choice, privatization, deregulation, magnet schools and charter schools.

In America's two-party political system, politicians from both parties took advantage of the backlash against school integration to win votes and public office.[61] Again, the nation will have to await the educational success of the several choice options discussed for more long-term evaluations before conclusions may be drawn. However, a confluence of other social and economic issues may help determine the success or failure of privatization. On the political side, politicians who support these efforts won more votes than their opponents. Yet, most choice programs are aimed at inner-city children. Wealthy communities have been content to watch the privatization movement with neutrality and with the rich on the sidelines it is difficult to predict the long-term future of the movement.

Conclusion

Experiments with a variety of choice programs will have to produce dramatic results for inner-city children in order to change the direction of public opinion about vouchers, charter schools, and the privatization of public schools' instructional programs.[62] The authors of this chapter advise school district officials who are contracting out for instructional services to obtain the training necessary to enter into such an agreement that will benefit children and meet the public's demand for accountability.[63] From the brief history of privatization, most enrollees are low performing students, which suggests that the remaining public student enrollees should have higher test scores collectively without changing their programs. Thus, this analysis of privatization in public education makes it clear that changes in political markets must precede changes in educational markets.

Notes

1 Wash, M. "Ka-Ching: Businesses Cashing In On Learning," *Education Week*, 19(13), p. 1, (November 24, 1999).

2 Gresham, A., F. Hess , R. Maranto, and S. Milliman, "Desert Bloom: Arizona's Free Market in Education" *Phi Delta Kappan*, 81(10), p. 751, (June 2000).

3 L. Schnaiberg, "Seeking a Competitive Advantage," *Education Week*, 19(15), p. 1., (December 8, 1999).

4 *Id.*

5 Schnaiberg, L., "Entrepreneurs Hoping to Do Good, Make Money," *Education Week*, 19(14), p. 14, (December 1, 1999).

6 Walsh, M, "Losing Money, Tesseract Sells Charters, College," *Education Week*, 19(39), p. 5, (June 7, 2000).

7 *See* note 2, pp 751-764.

8 Olson, L., "Redefining 'Public' Schools," *Education Week*, 19(33),p. 1, (April 26, 2000).

9 Harvey, W. B., "Vouchers and School Choice in Milwaukee: Changing Like the Weather," *School Business Affairs*, 16, p. 16-21, (April 2000).

10 *Jackson v. Benson*, 578 N. W, 2d 602 (Wis. 1998).

11 Johnston, R. C., "In Michigan, Students Shop for Districts: Schools Increase Marketing, Services." *Education Week*. 17, pp. 1 and 20, (1997).

12 Furst, L. G., "The Short But Very Curious Legal History of Michigan's Charter Schools." *West's Education Law Quarterly*, 5: pp. 233-245, (1996).

13 Hoff, D. J., "GOP Plans Push on Private School Tax Relief," *Education Week*, 17, p. 30, (September 3, 1997).

14 Loose, C. and V. Strauss, "Few Doors Open to School Vouchers," *Washington Post*, p. A1, (September 30, 1997).

15 Hartocollis, A., "Chancellor Lets Teacher Stay At School, But Parents Are Told District Will Pay Her," *The New York Times*, p. A20, (September 26, 1997).

16 Addonizio, M. F., "Private Sources for Public School Funds," *School Business Affairs*, 66 (5), 4-11, (May 2000), and Preyar, C. F.. "A Successful Private Foundation for a Public School District," *School Business Affairs*, 66(5), pp. 12-16, (May 2000).

17 *See* note 15.

18 *See*, e.g., Brown, F & R. C. Hunter, "The Privatization of Public Education: What Do We Mean?" *School Business Affairs*, 62(1), pp. 6-11, (1996, May); Richards, C. E., S. Rima, & M. B. Sawicky, *Risky Business: Private Management of Public Schools, Economic Policy Institute*, (1996); and Walsh, M., "Report Card on For-Profit Industry Still Incomplete," *Education Week*, 19(16), pp. 1, 14-16, (December 15, 1999).

19 Applebome, P., "Grading For-Profit Schools: So Far, So Good," *The New York Times*, p. A1, A13, (June 26, 1996).

20 *See* Brown & Hunter, note 18.

21 268 U.S. 510 (1925).

22 Applebome, P., "Lure of The Education Market Remains Strong for Business," *The New York Times*, pp. B1, B8, (January 31,1996).

23 Baten, E. C., "Lessons Learned: EAI and the Hartford Board of Education," *School Business Affairs*, 62(1), pp.12-16, (May 1996).

24 *See* note 20.

25 *See* Molnar, A., *Giving Kids the Business: The Commercialization of America's Schools*, (1996); Brown, F., "School Choice and the Politics of Decline," *Education and Urban Society*, 23(2), pp. 115-118, (1991); Brown, F. & A. R. Contreras, "Deregulation and Privatization of Education: A Flawed Concept," *Education and Urban Society*, 23(2), pp. 144-158, (1991); Carnoy, M., "Is School Privatization the Answer?" *American Education*, 19(3), pp. 29-30, (1995); and T. Henry, "Are School Vouchers Worthwhile?" *USA Today*, p. 1D, (April 11,1996).

26 *See* Brown, F., "Privatization of Public Education: Theories and Concepts," *Education and Urban Society*, 27(2), pp. 114-126, (1995); and Brown, F. & A. R. Contreras, "Deregulation and Privatization of Education: A Flawed Concept," *Education and Urban Society*, 23(2), pp. 144-158, (1991) .

27 Applebome, P., "Grading For-Profit Schools: So Far, So Good," *The New York Times*, p. A1, A13, (June 26,1996); and Walsh, M. "Ka-Ching: Businesses Cashing In On Learning," *Education Week*, 19(13), pp. 1, 14-16, (November 24, 1999).

28 Flam, S. and W. G. Keane, *Public Schools/Private Enterprise: What You Should Know and Do About Privatization*, (1997).

29 *See* Ascher, C., "Retraveling the Choice Road," *Harvard Educational Review*, 64(1), p. 216, (1994); Cibulka, J. G., "The Reform and Survival of American Public Schools: An Institutional Perspective," in *The Politics of Education and New Institutionalism: Reinventing the American School*, Crowson, R. L., W. L. Boyd, & H. B. Mawhinney (Eds.), (1996); and Molnar, A., *Giving Kids the Business: The Commercialization of America's Schools*, p. 117-149, (1996).

30 *See* note 8.

31 Molnar, A., *Giving Kids the Business: The Commercialization of America's Schools*, (1996); and Walsh, M. "Religious School Vouchers Get Day In Court," *Education Week*, pp.1, 6, (March 6, 1996).

32 *See* note 28.

33 *See* Molnar, A., *Giving Kids the Business: The Commercialization of America's Schools*, pp. 119-124, (1996); and Witte, J. F., "The Milwaukee Parental Choice Program," in *School Choice: Examining the Evidence*, E. Rasell & R. Rothstein (Eds.), (1993).

34 *See* Contreras, R., "The Charter School Movement in California and Elsewhere," *Education and Urban Society*, 27(2), pp. 213-228, (1995); Molnar, A., *Giving Kids the Business: The Commercialization of America's Schools*, pp. 151-166, (1996); Hegarty, S., "Independent Schools Face Uphill Financial Struggle," *The Herald-Sun* p. B3, (March 25, 1996); Rinehart, J. R., & F. L. Jackson, Jr., *American Education and the Dynamics of Choice*, (1991); and Martin, M., "Trading the Known for the Unknown: Warning Signs in the Debate Over Schools of Choice," *Education and Urban Society*, 23(2), pp. 119-143, (1991).

35 *See* Brown, F. & R. C. Hunter, "The Privatization of Public Education: What Do We Mean?" *School Business Affairs*, 62(1), pp. 6-11, (May 1996); Molnar, A., *Giving Kids the Business: The Commercialization of America's Schools*, (1996); Walsh, M., "EAI Gets Contract to Develop N.Y. District Budget," *Education Week*, p. 14, (February 21, 1996); Walsh, M., "Edison Posts High Marks in Inaugural Year: All Four Districts Have Plans to Expand," *Education Week*, pp. 1, 10, (May 29, 1996); and Walsh, M., "Court Clears Cleveland's Voucher Pilot," *Education Week*, pp. 1, 20, (August 7, 1996).

36 RPP International and the University of Minnesota, "A Study of Charter Schools: First-Year Report 1997," U.S. Department of Education, Office of Educational Research and Improvement, (May 1997).

37 Schnaiberg, L., "Michigan Tests Show Charter Schools Lagging Behind," *Education Week*, 24(4), p. 5, (1997).

38 *Brown v. Board of Educ.*, 347 US 483 (1954).

39 Johnson, R. C., "D.C. Voucher Proposal Tied Up Spending Bill," *Education Week*, 15(24), p. 27, (March 26, 1996).

40 *See* Molnar, note 25 pp. 14-15.

41 *Id.* p. 129.

42 Sommerfeld, M., "Pro-Voucher Foundation Carves Niche Among Philanthropies," *Education Week*, p. 16, (August 7,1996).

43 Gray, L. R., "The Collapse of Nonpublic Education: Rumor or Reality?" *The New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education*, (1971).

44 Gintis, H.,"The Political Economy of School Choice," *Teachers College Record*, 96: 492-511, p. 493, (1995).

45 Walsh, N. J., "Public School, Inc.: Baltimore's Risky Enterprise," *Education and Urban Society*, 27(2), pp. 195-205, (1995).

46 *See* Smith, K. & K. J. Meirr, "School Choice: Panacea or Pandora's Box?" *Phi Delta Kappan*, 77(4), pp. 312-316, (1995); and Gerth, J. & S. Labaton, "The Pitfalls of Private Penitentiaries," *The New York Times*, pp. A1, A14, (November 24, 1995).

47 Cookson, Peter W., Jr., *School Choice: The Struggle for the Soul of American Education*, (1994).

48 Coons, J. E., & S. D. Sugarman, *Education By Choice: The Case for Family Control*, (1978).

49 *Id.* p. 40.

50 Sommerfeld, M., "Pro-Voucher Foundation Carves Niche Among Philanthropies," *Education Week*, p. 16, (August 7, 1996).

51 Levin, H. M., "The Economics of Educational Choice," *Economics of Education Review*, 10(1), pp. 137-158, (1991).

52 Martin, M., "Trading the Known for the Unknown: Warning Signs in the Debate Over Schools of Choice," *Education and Urban Society*, 23(2), pp. 119-143, (1991).

53 Brown, F., "School Choice and the Politics of Decline," *Education and Urban Society*, 23(2), pp. 115-118, (1991).

54 Gross, J., "Wall Street's Frenetic? Try the Eighth Grade: Tutors, Test Tips, Japanese Discipline, Putting Billy and Suzy on the Fast Track," *The New York Times* p. 22, (October 5, 1997).

55 Fossedal, G. A., "Help for Schools? Try Deregulation," *The Wall Street Journal*, p. A22, (March 27, 1996).

56 Fowler, F. C., "American Theory and French Practice: A Theoretical Rationale for Regulating School Choice," *Educational Administration Quarterly*, 28(4), pp. 452-472, (1992).

57 *Pierce v. Society of Sisters*, 268 U.S. 510; (1925).

58 *Farrington v. Tokushige*, 273 U.S. 284, (1927).

59 406 U.S. 205, (1972).

60 Reed, R., *Contract with the American Family*, (1995).

61 Rose, L., A. M. Gallup, & S. M. Elam, "The 29th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitude Toward the Public Schools," *Phi Delta Kappan*, 29(1), pp. 41-58, (September 1997).

62 Olson, L., "Gauging the Impact of Competition," *Education Week*, 19(37), pp. 1,18-20, (May 24, 2000).

63 *See* Archer, J., "Accountability Measures Vary Widely," *Education Week*, 19(36), p. 19, (May 17, 2000); Olson, L., "Redefining 'Public' Schools," *Education Week*, 19(33), p. 1, (April 26, 2000); and Richards, C. E., S. Rima & M. B. Sawicky, *Risky Business: Private Management of Public Schools*, Economic Policy Institute, (1996).

CHAPTER **FIVE**

Legal Aspects of Site-Based Management

■ by Harvey B. Polansky

Site-based management (SBM) encompasses a multitude of strategies which impact every school business official. SBM is a governance strategy that involves school leaders, personnel, the community and, most importantly, students. The way in which SBM interacts with the law provides a unique backdrop for school governance and how schools of the Twenty-First Century will be managed. While a simple definition and explanation of the relationship between SBM and the law might suffice, in order to understand fully the legal implications of SBM this chapter examines relevant case studies. Accordingly, this chapter traces the history of SBM while reviewing pertinent legislative and judicial actions that have impacted SBM.

Definitions of Site-Based Management

According to the American Association of School Administrators, SBM is everywhere but nowhere, one of the most widely adopted reform initiatives during the 1980s and 1990s.[1] Most school districts across the country have implemented some form of SBM in order to improve accountability and productivity. In the same report by the American Association of School Administrators, Cawelti notes that key elements of SBM include:

- various degrees of site-based budgeting which afford alternate uses of resources
- a team operation that allows groups to expand the basis of decision making
- school site advisory committees which establish key roles for parents and students
- increased authority for selecting personnel who are assigned to schools

- the ability to modify the school's curriculum to better serve students
- clear processes for selecting waivers from local and state regulations that restrict the flexibility of local staff
- an expectation for annual accountability through annual reports.

Insofar as SBM teams are given myriad tasks and roles, data indicate that the roles of site-based teams need to be clearly delineated. The following chart provides an overview of decision making criteria made by SBM teams:

DECISION TOPICS	% UTILIZED IN SBM TEAMS*
Budgeting/Purchasing	*69.8*
Discipline	*64.5*
Curriculum Content/Selection	*59.4*
Textbook Selection	*41.6*
Tests/Assignments	*20.8*
Student Reports	*34.7*
Other	*17.6*

Personnel, discipline procedures, and curriculum content dominate the work of site-based teams. The work of teams accounts for good decision-making and high participant satisfaction levels. On the other hand, given the need to establish definitive roles, there are inherent conflicts of authority among administrators, central offices, and ultimately, the board of education. The stresses created by these conflicting forces create incongruities in the law and create the potential for school governance teams to create their own vision of schooling.

Evolution, Change or Abolishment?

Dade County School District in Florida, one of the nation's largest school systems with 365,000 students and a general fund budget in excess of two billion dollars, was one of the first school districts in the country to embrace SBM. For close to twenty years, Dade had studied its site-based program. Dade's experience is similar to that of many districts utilizing SBM. The original "principal/administrator dominated" schema has changed over the years. Districts have now empowered teachers, parents, and constituents to offer their own voices in the decision making process. School systems in Arizona, Florida, and Kentucky have altered the original principal dominated management plan by encouraging far

greater involvement in site decision making by parents, students, teachers and central office personnel.

The original intent of SBM is being reconsidered as new management systems with far greater controls and mandates are taking place. There are many factors that have led to these changes in site-based plans:

- SBM tends to support the concept of separate schools instead of district schools
- SBM pits teacher versus teacher and program versus program
- SBM enables community pressure to influence school decisions
- some principals are not ready nor willing to make final decisions
- SBM calls for the fiscal expertise of principals
- SBM requires training and time
- SBM fragments long range district plans
- decisions are often made on fiscal rather than instructional rationales
- real authority is difficult to give up
- results are often ambiguous.

The Beginnings of Site-Based Management

A review of SBM strategies provides clear organizational building blocks for local control and decentralized management strategies. Since there are no federal statutes governing SBM and because education is a state function, each state has the discretion to implement the laws governing education.

Each state has complete authority to modify education laws and regulations. Given this scenario, the worker becomes a willing and active participant in governance. As educators struggle to find a balance between centralized control and site-based control, legislatures attempt to define site-based governance and the different nuances associated with this new governance model.

Since the nation's largest 600 districts enroll forty percent of school-aged children, the size and scale of these site-based operations are significantly different than those implemented in smaller districts. The similarity, however, is that each state makes its own decisions about who teaches and under what circumstances schools operate. Local school districts are agents of the state, and as such the state may delegate authority to local districts. While there is substantial variety from state to state (Hawaii has a single statewide district, while New

Hampshire is highly decentralized), the state and local relationship is very different from the federal-state relationship. Smalley wrote in 1918 that

> ...the struggle for democracy in schools nationwide, has not ended yet and will not be until the happy day when the teacher has the right to make the course of study which she uses, to choose the textbook with which she works, and to elect to office the people under whom and with whom she administers the schools.[2]

Eighty years later educators struggle with Smalley's concerns. SBM is, in many ways, a matter of going back to the future. Dewey wrote in 1903

> What does democracy mean, save that individuals are to have a share of determining the conditions and the aims of his own work and that on the whole, through free and mutual harmonizing of different individuals, the work of the world is better done when planned, arranged and directed by a few?[3]

Although educational theorists have struggled with governance issues from the early writing of Mort[4] and Cubberly[5] and no definitive answer has yet been reached, this "back to the future" look provides a pragmatic overview of SBM. In *Brown v. Board of Education*,[6] the Supreme Court set parameters dictating who should attend local schools and how local control should be implemented for student attendance zones. *Brown* not only set standards for local control, but also ignited the battle over control which would ensue for the next forty years.

Many of the issues surrounding local control initially focused on racial issues. By the mid 1960s, battles over school governance and local control erupted in our major cities. Local control, community control and the abolition of Jim Crow laws laid the groundwork for present day SBM. Theorists now argue that choice, governance and school autonomy are at the heart of school reform.[7]

Significant Events

Site-based or decentralized management has been at the forefront of educational controversy over the last forty years. The following case studies provide an

overview of how school districts and legislatures have reacted to the implementation of decentralized management strategies over time.

New York City

The 1960s was an era of urban social upheaval which was reflected in New York's school system at the time. In light of New York's long history of bureaucracy at the city's board of education, the struggle for decentralization found little support.

In 1967, the Chancellor's Office, which directed the educational program for the five boroughs within the city, involuntarily transferred nineteen teachers under the guise of decentralized local control. Ocean-Hills-Brownsville District in the Borough of Brooklyn, was in the heart of a heavily urban African-American population. The Chancellor's actions ignited unrest that enveloped the entire city. The nineteen teachers, all white, protested that their pending transfer was racially motivated. Under the leadership of the late Albert Shanker, the local teachers' union called for a job action. This action and those of the Superintendent of Schools at that time, Rhody A. McCoy, resulted in a sixty day teachers strike that crippled the city's school system.

By 1969, the city legislated local control. The Decentralization Act of 1969 [8] took the Ocean-Hill experiment a step further by decentralizing the city schools into thirty-one separate local school boards with specific powers granted for local control. Local control is still being debated in New York because clear jurisdiction of local school boards and the power of the Chancellor continue to be disputed. For example, in November of 1999, then Chancellor Crew sanctioned a local school board but then dissolved it due to alleged improprieties. This action placed New York City governance in a different paradigm. New York is now governed locally by thirty-seven local school boards with separate elections. The Chancellor still wields power through his authority to dissolve boards, set educational citywide parameters, and the obligation of the district superintendents to report to him. The struggle between New York City's Board of Education and the need for local control in its five boroughs is only a microcosm of the struggle of SBM nationwide.

Detroit, Michigan

Detroit's local control issue is a clear reflection of the unrest that transpired in the streets of Detroit during the late 1960s. Student rioting and the racial unrest of the summer of 1967 forced local city school officials to examine financial and governance arrangements within the city. The main controversy

surrounded funding issues for the city's schools. The battle reached its zenith when the Supreme Court of the United States heard *Miliken v. Bradley*[9] which found that Detroit's predominantly white suburbs were established to foster racial segregation. Consequently, by 1971 Detroit had decentralized into eight regional districts, each with its own governance board. Because the central board of education still maintained significant power, Detroit's local boards, like New York's, fought for a voice.

Montgomery Township, New Jersey

Sometimes SBM is instituted to quell an uprising; this was true in Montgomery Township, an affluent suburban community in New Jersey. After a bitter teacher's strike in 1989, administrators sought systems to heal the vast wounds that had engulfed the district. Through the equalization of power among teachers and parents in a site-based system, dialogue and reform helped ease management tensions. This collaborative model moved Montgomery from a labor strife district to one of reflective practice and open dialogue.

The RAND Report

In a 1990 report, a RAND research team visited five major urban and suburban school districts that had adopted SBM. A brief synopsis of this report offers a variety of outcomes, conclusions, and recommendations.

Dade County, Florida

This Florida initiative was founded through the Citizen's Committee on Education in 1971[10] when then governor Ruben Askew concluded that education was in need of reform. "Complexity," said the governor, "is best handled where and when instruction occurs."[11] The Florida legislature enacted laws that empowered individual schools by making them the "basic units of accountability." Under Superintendents Britton and Fernandez, the nation's fourth largest district, Dade County saw sweeping reforms to shared decision making. These reforms allowed for changes in legislative waivers, school governance, budgetary, personnel and curricular decision making powers.

Columbus, Ohio

In 1989, all schools in Columbus were ordered to practice some form of shared governance through the establishment of associate building councils. School gov-

ernance teams were provided terms of membership and financial incentives were offered to those schools implementing this concept. As a safeguard, a principal's veto could override any decision made by the governance council.

Denver, Colorado

In 1990, Denver and the local teachers association were deadlocked in negotiations. During the course of these negotiations an independent coalition of teachers, administrators, and board members published *The Power of Collaborative Decision Making: A Handbook for Change in the Denver Public Schools.*[12]

Based on research from the Center for Quality Schools, Denver embarked on a rich collaborative effort that resulted in dramatic reforms in the city's school system. This collaborative model was directly tied to the teacher's contract settlement which legally assigned powers to the collaborative teams. The model designated roles for teachers, board members and community members relative to: instructional programming, curriculum, school organizations, school goals, personnel, school budgets, and policies and procedures. While providing input on management evaluation, this collaborative model effectively empowered schools to redesign programs to best meet their clientele. Denver's site-based system was the first collective bargaining collaboration which mandated site-based control.

Kentucky

In response to a need for reform in Kentucky's finance formula, school governance, instruction and leadership, the Kentucky Educational Reform Act of 1990 (KERA)[13] was enacted. Through the formation of a coalition of seventy-three communities, this reform provided for site-based decision councils. Kentucky's experience serves as an example of a state where legislation dictates governance. As expansive as Kentucky's program has been, the jury is still out on whether it has been successful.

Rochester, New York

The city of Rochester, home to 30,000 students and several *Fortune* 500 Companies such as Kodak, Xerox, and Bausch and Lomb, has enjoyed much financial stability.[14] In an effort to meet the needs of its diverse school population, a coalition was formed by the union, the school board, and business leaders to engage stakeholders in the budgeting process. School-based planning teams with specified roles for teachers in the budgeting cycle were legislated.

The district budgeting office was given no veto power but did have the authority to recommend alternative expenditure patterns. Expenditure accountability was legislated to remain at the building level.

International Implications

National systems of education in the United Kingdom (UK), New Zealand, Australia, and Canada represent an international focus on educational reform. These examples of reform demonstrate widespread restructuring that includes a real move from district or centralized control to more decentralized governance plans.

LAWTON'S STRUCTURE OF EDUCATION IN FIVE NATIONS [15]

Level of Responsibilities

New Zealand	Australia + UK	Canada	US
National	*State/Province Nat'l*	*State/Province*	*Local*

The research shows that SBM has an international flavor, based on traditional legislative protocol. New Zealand, Australia and the UK were at the forefront of the decentralization trend instituted by governmental legislation and the privatization of government-owned corporations. According to Lawton, "Traditional methods of finance and governance in school systems in North America, in which states and provinces fund schools, could be radically altered if more extreme forms of school-based management were adopted, as they have been in Australia, New Zealand and the UK." [16]

When Does Site-based Management Succeed?

Based on the various research efforts provided by the American Association of School Administrators, Association of School Business Officials, and the Association of Supervision and Curriculum Development, there are commonalties among successfully implemented site-based programs:

- Implementation is focused in the classroom, not in the administrator's office
- The focus is on student success
- Roles are defined and limited
- Training is provided with the acknowledgment that full implementation takes years, not months

- Consensus is mandated not preferred
- Leadership is shared
- Real authority is provided
- The organization must fund the initiative
- Schools join in one at a time when they are ready. Massive mandates do not work
- Assessment is regular and valid.

Conclusion

Over the past twenty years there has been widespread dissatisfaction with schools and the manner in which they are governed. While theorists argue over governance issues, Chubb and Moe[17] contend that SBM is bound to fail because it does not address the roots of the problem. In *Politics, Markets and American Schools*, Chubb and Moe point out that a choice system must be set up that is entirely beyond the reach of public authority. These authors have recommended that states withdraw authority over schools and divest authority to local schools, parents, and students. The relegation of authority by state leaders will help create a new system of public education with a fresh supply of schools, funded by a choice office in each district, with separate autonomous governance structures in each school.

Carl Glickman notes that every time some group works to get something done in schools they feel is important, the educational agenda gets moved to whatever that political pressure is. If public schools are to survive, they will have to find a better way to meet the needs of the diverse group and interests that seem to splinter the whole. SBM seems to be a means to that end.[18]

On the other hand, shared decision making does not necessarily make for better decision making on its own. For example, if teachers were selected to screen principal candidates and their three choices are not included in the final, does this result in good management? Legislative intervention has hailed SBM as the reform of all reforms. However, for success to occur, this strategy must become a permanent and active part of our school system's governance and culture.

Notes

1 Chion-Kenney, L., *Site-Based Management and Decision Making: Problems and Solutions*. American Association of School Administrators, p. iv, (1994).

2 Kearns, D. T. and D. P. Doyle, *Winning The Brain Race: A Bold Plan to Make Our Schools Competitive.*, San Francisco, CA: Institute for Contemporary Studies, (1991).

3 Chion-Kenney, *supra* note 1, p. 18-19.

4 Paul Mort wrote extensively on school finance and governance from 1935-1960. His landmark text *American Schools in Transition* (1941) laid the historical framework for the discussion of finance and governance in American schools.

5 Cubberly, the "grandfather" of school finance, wrote *School Funds and Their Appointment* in 1906.

6 347 U.S. 483, (1954).

7 Chubb, J. E. and T. M. Moe, *Politics, Markets, and America's Schools*, The Brookings Institution, (1990).

8 R. McCoy, "The Formation of a Community Controlled School District," in *Community Control of Schools*, 169-173. Henry M. Levin, Ed., (1970).

9 418 U.S. 717,(1974).

10 Chion-Kenney, *supra* note 1, p. 39-40.

11 *Ibid*, p.39.

12 Citizens for Quality Schools, "Denver Negotiations Reform: The Power of Collaborative Decision-Making," in *Site-Based Management and the School Business Administrator*. Association of School Business Officials International, pp. 47-50, (1993). (Note: this publication is no longer in print.)

13 *See* KY. Rev. State. An. §156.005-.990.

14 Cardilli, S. A., R. L. Sterling and Dr. S. L. Grazyck. "Teachers Tackle Budgeting: Site-Based Budgeting at Work" in *Site-Based Management and the School Business Administrator*, op cit, pp.17-22.

15 Lawton, Dr. S. B. "Implications of School-Based Management for School Finance: An International Survey," in *Site-Based Management and the School Business Administrator*, *supra* note 14, p 55.

16 *Ibid*, p. 56.

17 Chubb and Moe, *supra* note 7.

18 C. Glickman, *Renewing America's Schools: A Guide for School-Based Decisions*, (1993).

CHAPTER SIX

Transportation

■ by Ralph D. Mawdsley

Considering the hundreds of thousands of miles that school buses travel each year transporting students to and from classes and school activities, their safety record is remarkable.[1] In fact, between 1977 and 1992, only 0.4 percent of the more than 650,000 fatal traffic crashes involved school buses. More specifically, only eleven percent of school bus fatalities were occupants of the buses even though almost half of the crashes with other vehicles and more than half of the fatalities involving school bus passengers were front-end collisions. In addition, sixty percent of pedestrian fatalities involving school buses occurred while the buses were either driving straight forward or starting from a stopped position in a traffic lane.[2]

The statistics underscore that, although safer than other motor vehicles, the operation of school buses still represents a potential risk to districts, passengers, and those who encounter the buses as pedestrians or motorists. The purpose of this chapter is to explore some of the common areas where districts can be exposed to legal risks in operating school buses. Although the scope of this chapter does not include an exhaustive discussion of legal problems in this area, an identification of some of the more frequently litigated topics may be useful to those responsible for providing transportation for school systems.

School Bus Safety Requirements

The reality is that while school buses represent a comparatively safe means of transportation, they must be operated by competent and skilled personnel. The buses also need regular maintenance inspections to make certain they comply

with appropriate safety standards. Comprehensive safety requirements for school buses have most assuredly played a major role in their safety record. Moreover, although bus safety requirements are not necessarily uniform among states, there is consistency for such items as regular inspections,[3] maximum passenger capacities,[4] use of stop signal arms and lights,[5] location of fire extinguisher,[6] and mandatory special licenses[7] and seat belts for drivers.[8]

Variances among the states regarding safety features have prompted the United States Department of Transportation (DOT) to adopt guidelines and standards pertaining to manufacturing, equipping, and operating of school buses. Among these guidelines are the use of a rod in front of a bus to keep children within the direct view of the driver, use of signal arms and lights by local transit buses when transporting school children, semiannual bus inspections, twice-a-year emergency evacuation drills for students riding buses, and passenger seat belts for buses with less than 10,000 pounds gross weight rating.[9] Further, the DOT has enacted highly detailed and technical performance requirements for school bus design and manufacture to protect passengers in the event of a crash.[10]

Singularly missing are state or federal seat belt requirements on buses in excess of 10,000 pounds gross weight that carry many of the nation's children to and from schools. The National Transportation Safety Board, following up on a 1987 study, recommended that lap belts not be required on large buses, in part because such restraints would not have made a difference in saving passenger lives. However, the study indicated that states could require lap belts if they chose to do so.[11] To date, only two reported state cases, with differing results, have addressed liability for buses that lack seat belts for children.

The Supreme Court of Alabama[12] refused to find that school buses without seat belts violated the state's Extended Manufacturer's Liability Doctrine. The court determined that even though the state legislature required drivers to wear seat belts, it had not intended children to do the same. In addition, the court was of the opinion that since a school bus without pupil seat belts was not inherently defective or dangerous for purposes of products liability, it would not impose liability over their non-use.

Conversely, an appellate court in Oklahoma[13] decided that a litigable question was presented under a products liability theory where a school bus did not have passenger seat belts. Defendants in both the Alabama and Oklahoma cases were bus manufacturers, but if they were to be found liable, the question remains as to whether districts could be held accountable should school buses be considered dangerously defective because they lack pupil seat belts.

Insofar as the Oklahoma case indicates that liability under state law may exist even where bus standards meet federal guidelines, the responsibility is on state legislatures to determine whether compliance with federal standards should eliminate state causes of action. In other words, if a state legislature explicitly adopts the federal standards, as at least one state has done, such an action presumably could limit potential liability only to violations of federal requirements.[14] In the absence of such legislative action, school bus safety and design standards may be influenced more by litigation than legislation.

In a related negligence action, a school district in New York was not liable where a child in a school bus was injured when he had not been properly seat belted in. Parents, suing on behalf of their child, alleged that an issue of fact existed as to whether the child's seat belt was accessible to him and whether he had been properly instructed in use of the seat belt. In affirming the dismissal of the parents' complaint, an appeals court observed that, pursuant to New York statute, "school districts and bus drivers may not ordinarily be held liable solely because an injured passenger was not wearing a seat belt." [15]

Regardless of the ongoing debate over pupil seat belts, the owners and operators of school buses clearly have a responsibility to check vehicles regularly for defects. Whether owners meet their standard of care for students transported by buses waiting to correct defects after they have become known is problematic. This difficulty is illustrated by an appellate decision from Georgia[16] wherein the court suggested that the standard of care is not whether the bus owner inspected for defects after they became known, but whether an ongoing maintenance program had been established to replace parts that had deteriorated. Similarly, an appellate court in North Carolina[17] held that a private school was liable for a student's death when a bus stalled along a busy highway. The court concluded that the school was responsible because even though it knew about the bus's mechanical malfunctions, its only solution was to provide the driver with a set of jumper cables.

Another troublesome area is whether districts can avoid liability by contracting with private bus companies to transport students. Generally, if state law considers bus companies to be independent contractors, then districts are not likely to be liable for negligence of company employees either in driving or maintaining vehicles, as long as transporting children is not determined to be inherently dangerous work.[18] If a district chooses to contract out for bus services, it may be advisable to include an indemnification provision in the contract with the transportation company. The contractual language should indemnify a district for damages it may sustain due to an injury involving a school bus.[19]

Regardless of the strategies school districts employ to reduce or limit liability, the presence of unsafe buses on public streets is an invitation for a lawsuit. If districts use their own buses, they need regular preventative maintenance plans. On the other hand, if districts contract out for bus transportation, they need to include a company's maintenance record as part of the bidding process for the lowest responsible bidder. Hopefully, a state's lowest responsible bidder statute will permit a district to reject a low bidder with an inadequate safety record.[20]

Bus Stop Locations

The selection of bus stop locations presents a litigious issue since students are instructed to wait at places not of their choosing that may be in unsafe or heavily traveled areas. At the same time, school districts are normally not liable for injuries that students suffer as they cross streets or walk along roads on their way to the bus stop.[21] Moreover, districts are not likely to be responsible for injuries to students caused by other pupils at bus stops, but may be accountable for injuries caused by nonstudents.[22]

In many states, the location of bus stops may be considered a planning function and therefore immune from liability under governmental immunity.[23] Even so, liability may be predicated on negligent design of bus routes.[24] Although this distinction regarding liability is neither easy to understand nor consistently followed, liability may attach where a court considers that the issue is not one of the location of a bus stop but rather a design problem with variables such as the locations of the homes of students or dangerous conditions of which the district is knowledgeable. For example, an appellate court in Illinois[25] held that a student who was injured while crossing a railroad track after disembarking from a bus was entitled to a jury trial because the district did not have the vehicle stop at an alternative location which would not have required children to cross the tracks. Similarly, an appellate court in Florida[26] ruled that a school system was liable for $175,000 in damages over the death of a twelve-year-old student despite problems that were associated with a bus stop that it maintained. Among the difficulties with the location were near misses of students by cars and the absence of any traffic signals, signs, markers, or barriers designating the area as a bus stop.

An even more troublesome situation exists where the actions of school bus drivers who drop off children is related to liability insurance coverage and governmental immunity. In such a case, an appellate court in Georgia[27] reversed a $1 million judgment against a school district where a bus driver had dropped off a

kindergarten student in a hazardous location at an unapproved stop, requiring the child to walk along a dangerous road where he was struck and killed by a car.

In most states, governmental immunity is waived to the extent of liability insurance, but the Georgia court refused to find a waiver because the incident was an exception in the district's comprehensive liability coverage. The parents, of course, still could have attempted to recover from the bus driver, but large judgments are generally unrecoverable from individuals because they simply do not have the money to pay. While the school district won, the question is whether taxpayer/parents who approve or reject requests for levies understand and appreciate the public policy rationale behind liability insurance waivers and governmental immunity.

To a large extent, school districts rely on information from parents in designing bus routes and stops. Even so, districts may be liable due to the unilateral acts of students who select alternate bus stops. In one case, the Supreme Court of Kansas[28] affirmed that a school district was not liable for a student's injury when his parents had been requested to select a bus stop on the side of the road nearest their home but the driver had no knowledge that they had chosen one across the street from their residence. However, knowledge by the driver that the parent has made a mistake affects immediately the responsibility to see that the child safely crosses the street, rather than wait for the school district to change the bus stop location to the other side of the street.[29]

When students miss the bus at their designated stops, the legal issues are twofold: whether a district is liable for students hurrying to another designated bus stop and whether it is responsible for picking up pupils at undesignated locations. A district can be liable in the former situation only if it has communicated its endorsement of the practice so that parents have come to rely on an alternate bus stop route.[30] Liability can occur in the latter anytime a district knows that an undesignated stop is being used.[31] Yet, self-help efforts by parents to compensate if their child misses a bus can impact upon other obligations. For example, an appellate court in New York[32] held that a bus driver who ordinarily did not transport the injured child in question did not have a duty to activate the vehicle's flashers after a parent flagged him down.

Responsibility En Route To and From School

School districts must satisfy a minimum standard of care in transporting students. If a district operates its own buses, then the standard is usually ordinary

care, proportionate to the age and ability of children to care for themselves.[33] Even so, in some states, buses operated by private companies under leases to districts may be held to the higher standard of care for common carriers.[34]

Although bus rides to school are relatively brief, students can become disruptive or ill. As illustrated by a case from Ohio,[35] the standard of care to which a bus driver or school district is held under these circumstances can affect its liability. The Sixth Circuit affirmed that a district was not liable under a federal civil rights claim where a child who was a passenger on a school bus died of heart failure. The court maintained that since the driver reasonably thought that the student was only experiencing an epileptic seizure and took her home without medical intervention, this incident did not demonstrate a practice or custom of deliberate indifference, the standard required for recovery under section 1983 of the Civil Rights Act of 1964.

A central issue before the Sixth Circuit was how much knowledge a district officials must have about a student's special conditions before they become responsible to train bus drivers to address those needs. Insofar as cases are always fact-specific, the Sixth Circuit was not satisfied that district officials had sufficient notice about seizures on buses to require a training program. Even so, denial of recovery under federal law does not mean that a party might not be successful under state law.

Lawsuits filed pursuant to section 1983 concern violations of liberty and/or property interests under the Fourteenth Amendment and are frequently referred to as constitutional torts. Although such constitutional torts may involve different substantive proof requirements from negligence claims under state law, the results may be the same as in the Sixth Circuit's decision in states that require proof of gross negligence or reckless disregard, which is very similar in definition to deliberate indifference, before recovery is possible under a negligence. On the other hand, the result in the Sixth Circuit might well be different in states that permit liability under the lower common law ordinary standard of care for negligence. Under either approach, liability will depend on what a district and bus driver knew about an individual student's needs and how much those needs had been disregarded in the past.

The Sixth Circuit's opinion raises larger questions over training bus drivers to address emergencies. This complex issue has two broad aspects: whether every district must have a plan to address the medical needs of students and whether bus drivers are expected to perform medical interventions or to exercise medical judgment concerning options for a child who is ill. To date, the law provides no guidance.

School districts officials need to consider at least three additional questions. The first inquiry is whether all students who are ill should be taken to medical facilities regardless of the kind of illness or whether such a practice should be reserved only for specific children with special medical needs. The second query is whether all bus drivers need to be trained in emergency medical practices such as CPR or be prepared to administer other kinds of emergency care. The third question asks whether bus drivers who perform emergency care practices would be held to the ordinary standard of care associated with the mythical reasonable person, or to the higher standard associated with the medical professional possessing specialized knowledge and training.

The existence of a school district plan for addressing medical emergencies does not mean that bus drivers will have any direct intervention responsibilities. However, if a district has had past medical emergencies, failure to have a plan may well demonstrate deliberate indifference or gross negligence at one end of the liability spectrum and very likely ordinary negligence at the other.

Increasing emphasis on mainstreaming or inclusion of special needs children in classrooms invariably means that these students must be transported to and from home or to and from other instructional sites during the school day. Contrary to standard operating procedures in which districts have no advance notice of medical emergencies, these children have Individual Education Plans (IEPs) which not only describe their needs but also, in most cases, prescribe treatment. In fact, the IEPs of some students are likely to require assistants to travel with them on school buses while many of the children who are less challenged will have no one but the driver to help them in the event of a medical emergency. What is clear is that a district cannot arbitrarily segregate all special needs children on special buses, even if the purpose is to concentrate them so that a driver with medical training is available since doing so could, at the least, be discrimination under section 504 of the Rehabilitation Act of 1973.

The importance of a plan for dealing with medical emergencies is based on the notice school officials have regarding the emergency situations that have arisen on school buses. Much the same reasoning can apply to addressing problems of disruptive student conduct on buses.

Bus drivers will regularly be called upon to deal with disruptive students. Fortunately, most of the disruption does not pose a threat of physical harm to students. Yet, compressing students into the confined space of school buses presents a double source of problems. Problems can arise from students who are in close proximity to each other and cannot readily escape their tormentors and on

the other hand from parents who cannot understand why order cannot be maintained in a confined space. Other than the obvious reaction, in the form of lawsuits, that the parents of disruptive students have produced, an interesting potpourri of proposed solutions are present. In order to restrain disruptive students, districts can use lap belts, which, although somewhat useful in controlling discipline, has been suggested by a study to be more harmful to students in the event of a crash than if no belts were used at all;[36] use video cameras, which have produced improvement in conduct, but at the expense of approximately $1,000 per bus;[37] and/or use volunteers on buses so that drivers can concentrate on driving.[38] Of course, using volunteers can raise another set of liability concerns.

When students create disruptions on school buses, drivers are expected to respond appropriately. For example, in a case from Texas, the Fifth Circuit[39] permitted a parent, whose son had been beaten unconscious on a school bus during a fight, to sue the driver, but not the district, under a federal constitutional tort theory. The court reasoned that the driver could be sued because he continued to drive the bus after he was advised of the fight and injury to the child, but chose to drive to a convenience store to call his supervisor rather than take the bus directly to a hospital across the street. The court refused to permit the suit to proceed against the district due to the lack of evidence that the fights on buses were other than episodic. Further, the court pointed out that under federal constitutional tort theory, a governmental entity, such as a school district, can be sued only if there is evidence that its officials engage in a practice or custom of violating the liberty or property interests of individuals. Thus, a federal claim against the district would only have been possible if the altercations were frequent and officials failed to provide the bus drivers with an adequate training program to deal with frequent fights. Even so, administrators should note that the reasoning in the case from Texas does not apply in all jurisdictions and so their districts may not be immune from liability under similar circumstances.

In yet another case from New York,[40] a school district was held liable for a $100,000 judgment under a state negligence theory for a student who had suffered permanent eye injury after being struck by an object that was thrown by a fellow passenger. The court relied on the fact that the bus driver had been advised of the disruptive behavior fifteen minutes prior to the injury occurring but failed to take appropriate steps to stop the misconduct.

Responsibility for student-safe buses extends to occurrences involving circumstances other than medical emergencies and disruptive behavior by students. As

illustrated in a ruling from Tennessee,[41] preventing students from sticking their hands, arms, or heads out of windows may require repeated warnings. In this case an administrator had assigned a teacher to serve as a monitor in assisting buses to pull safely out of the school parking area by giving the driver directions as he backed the bus up. The teacher was also expected to warn students to keep their hands and arms in the bus. After giving several warnings to a number of students to keep their heads and arms in the bus, the monitor signaled for the bus to back up; suddenly, a twelve-year-old student stuck his head out of a window and was fatally injured when his head struck a guide wire that was in close proximity to the bus. The Supreme Court of Tennessee agreed that the district was not liable for ordinary negligence based on the teacher's repeated warnings coupled with the students' age. This case highlights the issue that reasonableness of a district's conduct depends on a variety of factors, among which are the age and maturity of the students. The possibility might exist that with younger children, even repeated warnings may not be enough to prevent liability. As such, a bus driver of young children may have to take such measures as requiring all of the vehicle's windows to be closed until it is moving forward.

A persistent problem, but one that has not generated litigation, is student clothing becoming stuck in the door of a school bus. Not unlike other situations involving lack of a driver's attention to care, this problem has two dimensions that probably affect the dearth of case law. First, since most states exempt school bus operations under governmental immunity, disembarking students would be considered to be covered under school bus operations. The one exception, of course, would be if a district had liability insurance covering such a situation so that immunity would be inapplicable. The legal issues dealing with the interaction of negligence, insurance, and governmental immunity are so complex and confusing that any judgment on behalf of an injured child can be assured of a long and expensive appeals process, extending any possible recovery far into the future. Second, while school bus drivers are not necessarily covered by governmental immunity, they normally are not considered to be good sources of recovery for large judgments. The fact that drivers who are inattentive enough to fail to see that students have caught their clothing in a bus door probably have been fired, tends to make them even more judgment-proof because they are not likely to have an income. Accordingly, mandatory liability insurance for bus drivers, apart from that for school districts, would seem to be a good investment.

Failure to Use Safety Equipment

State laws uniformly require school buses to have certain safety equipment such as signal arms and flashers that must be used when students enter or disembark from the vehicles. The responsibility of bus drivers to use flashers and signal arms to assure that students safely cross a street is virtually absolute. Deactivation of lights prematurely or failure to activate them at all can generate liability for the bus driver, even if not for the school system.[42] For example, a district in Washington was liable for the death of a thirteen-year-old student where there was undisputed evidence that the bus driver discharged her along a road without using flashers or a stop sign and without keeping the child in sight until after she had crossed the street. The court's observation regarding use of safety equipment is worth noting: "The laws ... governing school bus operators establish uniform guidelines that do not vary according to the age of the student, his or her familiarity with the surroundings, or other individual factors."[43]

The purpose of safety equipment is to ensure that other motorists are aware of the presence of students. Although bus drivers are ordinarily aware of which side of the road a student lives on, children may occasionally cross a road after exiting a bus. Thus, a school district may be liable where a bus driver is aware of the student's intentions. For example, the Supreme Court of Appeals of West Virginia[44] held that a district was liable where a driver discharged a student on the side of the street on which she lived but failed to keep the flashers on when she crossed the road behind the bus to her mailbox on the other side of the street. Similarly, responsibility can extend to a student who lives on the side of the street on which she is discharged, but the school district is aware that pupils frequently cross the street to meet members of their family on the other side.[45]

The responsibility to use flashers can lead to unanticipated results. The Supreme Court of Louisiana[46] decided that a district was responsible not only for the death of a four-year-old boy who was struck by a car after the flashers had been discontinued before he reached the other side of the street, but also responsible for emotional damages to the driver of the car that struck the child.

Conversely, as exemplified by a case from New York,[47] the obligation to use flashers and stop signs has a limit. In this case the court maintained that a district was not liable as a matter of law for a child who had safely crossed a first street but was then struck by a car while he was attempting to cross a second street.

Alternative Means of Student Transportation

Few areas seem as volatile as the matter of students who select alternate means of transportation to or from school or to and from school sites or field trips during the academic day. The problem can be further complicated when some parents consent to such alternative arrangements while others do not.

The law is clear that, except as mandated by state statutes, districts are not required to provide bus transportation. The only notable exception to this general rule is when students with disabilities have provisions for transportation in their IEPs. A district would face liability to a student with an IEP since failure to provide transportation could be construed as denying the child the right to a free appropriate public education under the Individuals with Disabilities in Education Act.

Generally, schools are not liable for injuries sustained by students who have selected alternate forms of transportation to or from school. This rule is based not only on the rationale that a school's responsibility does not begin until a child is on the bus in the morning but also that a system cannot compel a child to ride a bus home at night. The exceptions arise where a district or its employees have assumed responsibility that a child will ride the bus or have contributed to the student's failure to ride the bus. For example, an appellate court in New York[48] held that the father of a fifteen-year-old student who was injured in a car while riding home from school stated a triable cause of action for negligence where an educator purportedly agreed to the father's request to ensure that his son ride the bus home from school. Conversely, an appellate court in Wisconsin[49] posited that a bus driver, but not the district, was liable for injuries sustained by a child who was struck by a car while riding his bike to school because the driver barred him from the bus. The court found that the district was not liable because of a school rule that clearly stated only an administrator could suspend a student from riding on a school bus. Especially damaging here was the driver's failure to notify the child's parents that he had been suspended from the bus.

The most troublesome area continues to be use of private cars. Ordinarily, the mere fact that students use their own cars for a school-sponsored activity does not in itself generate liability.[50] However, a district can be responsible if it provides bus transportation but grants an exception for a student who uses a car[51] or whose unauthorized use of a car is known by school officials.[52] This rule was reflected in a case from Ohio[53] where an appellate court decreed that an injured student was able to satisfy the bulk of his $314,650 judgment against the school's insurer because a private car in which he was injured was considered to be a "hired vehicle" within the terms of the district's liability insurance. The

court also noted that the person in charge of a field trip had asked for volunteers to drive their family cars.

Courts have usually been reluctant to find districts liable where students have been injured in cars while traveling from one school site to another.[54] Along these lines, some districts have enacted "driving/riding policies" requiring parental permission before students can ride in private cars from one school site to another. Even a district's failure to provide adequate supervision of such a policy may not create liability in a state that requires gross negligence to generate liability.[55] Although courts have not always clearly articulated their reasons for not finding liability (other than in situations involving governmental immunity), they may simply be responding to the reality that, unless a school official has made a specific promise to a parent regarding private vehicles or has requested their use by parents or students, requiring school officials to supervise their parking lots is more than can reasonably be expected.

Alternate forms of transportation can involve public trains or buses. In *Reyes v. City of New York*,[57] an appellate court sustained the dismissal of a complaint against the Board of Education of New York City where the district relayed information to students regarding a "Safe Passage" program designated certain subway trains as ones on which transit police would be present to protect students. High school students stabbed on one of the designated subways alleged that the school district was liable when the police were not on the train to protect them. In affirming the dismissal of the complaint, the court held that since the school district was only a conduit for Transit Authority information, it lacked a special relationship with the students on which a successful claim could be based. However, the court remanded to permit trial against the Transit Authority on a special relationship theory based on the claim that adequate police protection would be provided. Special relationship theory is an emerging theory of recovery and *Reyes* suggests, at least in New York, the theory might be viable where promises regarding student safety are made.

Conclusion

Transportation problems in education present a collage of interacting liability issues. Selecting bus stops and providing safe rides are standard expectations. Moreover, safety has been undergirded by a host of state and federal statutory and regulatory requirements pertaining to safety equipment. Courts have little latitude for tolerance by bus drivers who fail to use safety equipment, especially

flashers and stop signs. Courts are more understanding of the difficulties confronting school officials who monitor district policies over the use of private cars. Yet, this reluctance to find liability should not prevent schools from having policies affecting use of private cars, at the very least to alert students to the risks involved in riding with other students who may or may not have appropriate private liability coverage.

Providing school bus transportation is a considerable responsibility. School districts will be expected to have in place adequate training programs for drivers and safety inspection programs for the buses.

Notes

1 *See School Bus Safety Report* 4-7 (U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., (May 1993).

2 *Traffic Facts 1992: School Buses* 1,3 (U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin.).

3 *See*, e.g., Minn. Stat. Ann. § 169.451 (West 1995).

4 *See*, e.g., Pa. Stat. Ann. tit. 75, § 4552(d) (Purdon 1977).

5 *See*, e.g., Iowa Code Ann. § 321.372 (West 1985).

6 *See*, e.g., Cal. Educ. Code § 39838 (West 1993).

7 *See*, e.g., Fla. Code Ann. § 234.091 (West 1994).

8 *See*, e.g., Ill. Ann. Stat. § 512.807 (Smith-Hurd 1995).

9 U.S. Dep't of Transp., *Highway Safety Program Guideline No. 17* (23 C.F.R. 1204.4), (1991). *See also National Transp. Safety Bd. Study: Crashworthiness of Small Poststandard School Buses* 14 (Report No. NTSB/SS-89/02).

10 49 C.F.R. § 571.220 (Standard No. 220; School Bus Rollover Protection), § 5 71.221 (Standard No. 221; School Body Joint Strength), and § 571.222 (Standard No. 222; School Bus Passenger Seating and Crash Protection), (1990).

11 *See National Safety Board Safety Study: Crashworthiness of Large Poststandard Schoolbuses*, 73-96 (Report No. NTSB/SS-87/01).

12 *Dentson v. Eddins & Lee Bus Sales*, 491 So. 2d 942 (Ala.1986).

13 *Attocknie v. Carpenter Mfg.*, 901 P.2d 221 (Okla. Ct. App.1995).

14 *See*, e.g., *Fla. Stat. Ann.* § 234.051(2) (West 1995).

15 *O'Connor v. Mahopac Cent. Sch. Dist.*, 692 N.Y.S.2d 76, 77 (N.Y. App. Div. 1999). *See* N.Y. Education Law § 3813 ("school bus against a school district, school bus operator under contract with a school district, or any agent or employee of a district or operator (including, but not limited to, bus drivers, matrons, teachers serving as chaperones and volunteers) no such person shall be held liable solely because the injured party was not wearing a seat safety belt.") For arguments on behalf of lap belts, *see, supra* note 11 at 83.

16 *Kirby v. Spate*, 448 S.E.2d 7 (Ga. Ct. App. 1994).

17 *Sharpe v. Quality Educ., Inc.*, 296 S.E.2d 661 (N.C. Ct. App. 1982).

18 *See Dixon v. Whitfield*, 654 So. 2d 1230 (Fla. Dist. Ct. App. 1995); *Settles v. Incorporated Village of Freeport*, 503 N.Y.S.2d 945 (N.Y. Sup. Ct. 1986).

19 *See Merrimack Sch. Dist. v. National Sch. Bus Serv.*, 661 A.2d 1197 (N.H. 1995).

20 *See Dineen v. Town of Kittery*, 639 A.2d 101 (Me. 1994) (court approved bid $30,000 higher than low bid).

21 *See Norton v. Canandaigua City Sch. Dist.*, 624 N.Y.S.2d 695 (N.Y. App. Div. 1995); *Cavalier v. Ward*, 723 So. 2d 480 (La. Ct. App. 1998).

22 *Cf. Fornaro v. Kerry*, 527 N.Y.S.2d 61 (N.Y. App. Div. 1988) with *Dedes v. Asch*, 521 N.W.2d 488 (Mich. 1994).

23 *See Hewett v. Miller*, 898 S.W.2d 213 (Tenn. Ct. App. 1994).

24 *See Houle v. Galloway Sch. Lines*, 643 A.2d 822 (R.I. 1994).

25 *Garrett v. Grant Sch. Dist. No. 124*, 487 N.E.2d 874 (Ill. App. Ct. 1985).

26 *Duval County Sch. Bd. v. Dutko*, 483 So. 2d 492 (Fla. Dist. Ct. App. 1986).

27 *Burke County Sch. Dist. v. Roberts*, 469 S.E.2d 529 (Ga. Ct. App. 1996).

28 *Hackler v. School Dist. No. 500 of Kansas City*, 777 P.2d 839 (Kan. 1989).

29 *See Stokes v. Tulsa*, 875 P.2d 445 (Okla. Ct. App. 1994).

30 *See DiCabo v. Raab*, 516 N.Y.S.2d 995 (N.Y. App. Div. 1987).

31 *See Bruce v. Hasbrouk*, 620 N.Y.S.2d 562 (N.Y. App. Div. 1994).

32 *Keiser v. Elmer*, 639 N.Y.S.2d 118 (N.Y. App. Div. 1996).

33 *See Sharpe v. Quality Educ.*, 296 S.E.2d 661 (N.C. Ct. App. 1982).

34 *See Durham Transp. v. Valero*, 897 S.W.2d 404 (Tex. Ct. App. 1995).

35 *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907 (6th Cir. 1995).

36 *See supra* note 11 at 73, 78, 95, 97.

37 "Say Cheese!", *Education Week*, 4, 14 (September 21, 1994).

38 *See*, e.g., *Ohio Rev. Code* § 3327.16 (Baldwin 1994) (includes volunteer adults and responsible older students, but they are expressly not employees and are not compensated).

39 *Lopez v. Houston Indep. Sch. Dist.*, 817 S.W.2d 351 (5th Cir. 1987).

40 *Blair v. Board of Educ. of Servurne-Earlville Cent. Sch.*, 448 N.Y.S.2d 566 (N.Y. App. Div. 1982).

41 *Arnold v. Hayslett*, 655 S.W.2d 941 (Tenn. 1983).

42 *See*, e.g., *Chainini v. Board of Educ. of New York City*, 639 N.Y.S.2d 971 (N.Y. 1995).

43 *Yurkovich v. Rose*, 847 P.2d 925 (Wash. Ct. App. 1993).

44 *Yeager v. Morgan*, 429 S.E.2d 61 (W. Va. 1993).

45 *See Farley v. El Tejon Unified Sch. Dist.*, 274 Cal. Rptr. 780 (Cal. Ct. App. 1990).

46 *Clomon v. Monroe City Sch. Bd.*, 572 So. 2d 571 (La. 1990).

47 *Womack v. Duvernay*, 645 N.Y.S.2d 831 (N.Y. App. Div. 1996).

48 *Wenger v. Goodell*, 632 N.Y.S.2d 865 (N.Y. App. Div. 1995).

49 *Toeller v. Mutual Serv. Cas. Ins. Co.*, 340 N.W.2d 923 (Wis. Ct. App. 1983).

50 *See Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

51 *See Williamson v. Board of Educ. of Berne-Knox*, 375 N.Y.S.2d 221 (N.Y. 1975).

52 *See Sumter County v. Pritchett*, 186 S.E.2d 798 (S.C. 1971).

53 *Caston v. Buckeye Union Ins. Co.*, 456 N.E.2d 1270 (Ohio Ct. App. 1982).

54 *See Wickey v. Sparks*, 642 N.E.2d 262 (Ind. Ct. App. 1994); *Capuzzi v. Heller*, 558 A.2d 596 (Pa. Commw. Ct. 1989).

55 *See Steele v. Auburn Vocational Sch. Dist.*, 661 N.E.2d 767 (Ohio Ct. App. 1994); *Richards v. Hambright*, 374 S.E.2d 296 (S.C. 1988).

57. 656 N.Y.S.2d 379 (N.Y. App. Div. 1997).

CHAPTER SEVEN

Educational Reform:
Charter Schools and Voucher Systems

■ by Richard A. Mills, Jr., Christine L. Chinni, & Anne H. Littlefield

Educational reform is a current "hot" topic, generating great interest and debate in many circles. Political leaders from our last three Presidents to state legislators have been forced to grapple with the perceived failure of many public school systems, particularly in urban settings. While many educators, and others, claim that the public schools have been blamed unfairly for problems and societal changes outside the schools' control, the cry for school change has continued unabated, resulting in both legal challenges and legislative initiatives. This chapter looks at the structure of, and legal issues surrounding, two popular legislative solutions: charter schools and voucher systems.[1] Insofar as the authors neither advocate nor oppose charter school and voucher initiatives, this chapter does not address the merits of these approaches. Rather, this chapter describes a variety of charter school and voucher initiatives introduced in the states which have adopted these measures, along with current and potential legal issues raised by such systems.

Charter Schools

Charter schools are public schools which are created through the granting of a "charter" by local school districts and/or state boards of education. While legislation varies from state to state, charter schools generally can either be established as new schools or can be converted from existing public schools. The concept underlying charter school initiatives is to encourage educational innovation by creating public schools which are free, at least in part, from bureaucratic and legal constraints.

The success of such charter schools is likely to turn in part on the degree to which a state legislature has freed charter schools from such restraints while providing the financial and institutional support necessary to avoid failure. Equally important to the success of charter schools is the manner in which the charter school legislation addresses potential conflicts between charter schools and local school districts.

As such, this analysis is meant to provoke questions regarding the adequacy of state legislation in facilitating the mission of charter schools—the provision of quality educational services to their students.

Freedom From Constraints

One of the fundamental goals of charter school legislation is to create public schools which are free from the controls placed on them by the multilayered bureaucracy and expansive regulatory scheme typically imposed upon traditional public schools. Surprisingly, many state legislatures across the country have elected to keep in place for charter schools most or all of the rules and regulations applicable to traditional public schools such as certification requirements and collective bargaining obligations.

As of October 1, 1999, thirty-six states, the District of Columbia, and Puerto Rico, had passed legislation enabling the creation of charter schools.[2] Thirty-two states, the District of Columbia and Puerto Rico currently have charter schools.[3] With respect to exemptions from statutes and regulations, charter school legislation has two typical structures. The first model involves a broad exemption from a wide array of statutes and regulations, with the exception of a handful of statutes governing such fundamental matters as health, safety, and discrimination. This approach is followed in Arizona, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Louisiana, Massachusetts, Minnesota, Missouri, Mississippi, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Wisconsin. Under the second model, used in Alaska, Arkansas, Colorado, Connecticut, Georgia, Kansas, Michigan, New Jersey, New Mexico, Rhode Island, Utah, Virginia, and Wyoming, all statutes and regulations that apply to traditional public schools apply with equal force to charter schools. However, these statutory schemes allow charter schools to apply to the state board of education or local school district for waivers of certain statutes or other regulatory requirements. Several of the states adopting this model have specified particular statutes and regulations that cannot be waived, with some states having a long list of non-waivable provisions, and others specifying very few non-waivable provisions.

While most legislative schemes fall within one of these broadly defined models, California has adopted a unique system under which a charter school is exempt from state laws but must get a specific waiver for exemption from policies adopted by the local school district. Massachusetts has enacted the opposite type of statutory scheme: a blanket waiver from district regulations and policies, but no automatic exemption from state laws and regulations. Nevada has a similar provision, whereby the local district rules do not apply, except as provided in the charter.

In states where charter schools can request waivers of certain statutory provisions, constitutional questions may arise. A legislative delegation of the right to waive statutory provisions may be unconstitutional under some state constitutions. In Kansas, the Attorney General issued an opinion stating that the delegation to the State Board of Education of the right to waive statutory provisions constitutes an unconstitutional violation of the separation of powers doctrine.[4] This opinion notwithstanding, the Kansas Charter School statute provides that the State Board of Education may consider the application and approve, deny, or amend the waiver before approving the application.[5] If other states join Kansas in finding the second model unconstitutional, the first model, which legislatively grants a broad waiver with particular statutes enumerated that charter schools must adhere to, may ultimately prevail as the preferred legislative scheme.

State legislatures appear to be most reluctant to exempt charter schools or even allow them to apply for waivers from mandates such as collective bargaining laws, which protect employees. Charter school legislation typically permits school employees to act as a group in choosing one of three options: remain covered by the local school district's collective bargaining agreement; negotiate a separate bargaining agreement covering only charter school employees; or work without a bargaining agreement. Even in states that allow charter school employees an option that includes the flexibility to "opt out" of a local bargaining agreement, some restrictions are still imposed. For example, in New Jersey, a charter school may choose whether to offer the terms and conditions of the local district's collective bargaining agreement, but must adopt the health and safety provisions thereof and cannot offer a higher salary step than the top step offered within the district.[6]

The difficulties posed by restrictive collective bargaining legislation for charter schools are clear. Many collective bargaining agreements place limits on class schedules, class size, the number of classes to be taught by individual teachers, and so on. To the extent that a charter school is legally constrained to adhere to

the provisions of the local district's collective bargaining agreements, one questions whether the charter school will be able to accomplish to any significant degree the goal of innovative educational reform.

The collective bargaining process itself will likely become much more difficult in those states where a local district's employees and a charter school's employees must be covered by the same agreement. Depending on the nature of the legislation, a charter school may have little or no role in negotiating collective bargaining agreements for its employees. This is particularly troublesome since the interests of the charter school and the local district, and the interests of both groups of employees, are likely to differ significantly.

While much of the legislation enacted to date does not appear to recognize such difficulties, Minnesota has taken an innovative approach that at least attempts to address these difficulties. Minnesota's charter school legislation allows charter school employees to remain covered by a local district's collective bargaining agreement only if the local board of education, the charter school board of directors, the teacher's representative from the local school district, and the charter school employees all agree.[7] This provision at least creates some opportunity for the parties to select a collective bargaining approach which best suits their respective needs.

As with the collective bargaining arena, most states have enacted legislation strictly controlling the subject of retirement benefits for charter school teachers. Almost every state charter school statute provides that charter school teachers may participate in retirement systems on the same terms and conditions as regular public school teachers.

Charter school legislation is also surprisingly restrictive with respect to certification requirements. Only a few states have chosen to exempt charter schools from laws and regulations regarding certification. Most states either require all teachers to be certified in accordance with the state requirements or have very limited exceptions to the state requirements. For example, in Delaware, certification is required for all charter school teachers, but an alternative route to certification may be utilized such that thirty-five percent of the teachers in a charter school may be legally employed pending formal certification.[8] In states in which charter schools are sponsored by institutions of higher learning, such as Michigan, certification requirements are waived only so that community college professors may serve as teachers within the charter school without obtaining certification.[9]

States that allow more flexibility with respect to certification include North Carolina, which employs a sliding scale for certification; for grades K-5, seventy-

five percent of the teachers employed in a charter school must be certified; in grades 6-12, fifty percent of such teachers must be certified.[10] Similarly, New Hampshire requires that at least fifty percent of the teachers employed in a charter school must either be certified or have three years of classroom experience.[11]

Many states have thus chosen to impose on charter schools many of the same legal constraints historically applied to traditional public schools. One wonders whether charter schools will be able, in the face of such constraints, to become significantly different from traditional public schools.

Autonomy and the Local School District

The degree to which a charter school can be innovative is also likely to turn in part on its autonomy. Significantly, many states require charter school applicants to obtain approval from a local school board first before obtaining a charter from the state board of education. In addition, in many states, the provision of State funding to a charter school results in a corresponding loss of funding to a local district. Further, many states have chosen to require local districts to provide certain services, such as transportation and health and welfare services, to a charter school, with little or no negotiation over the costs for such services. As a result, there is the potential for considerable conflict between local school districts and charter schools.

The enabling legislation for charter schools varies with respect to the manner in which they come into existence. In some instances, charter schools must be approved by a local school district; in others, they can be created independent of local control and are sponsored by entities such as the State Board of Education, universities, or private organizations. There is considerable potential for conflict in states where a local district must approve the establishment of a charter school.

Tension over funding matters is likely as well. The funding of charter schools is clearly central to their success. Most states allocate full per pupil spending allotments to charter schools whether based on a state average or based on a local per pupil expenditure. In Colorado, a charter school applicant must enter in a contract with the local school district over the level of its funding. Beginning with the 1999-2000 budget year, ninety-five percent of the per pupil expenditure is the starting point for negotiations.[12] Other states start the negotiations between local school districts and charter schools at a comparable per pupil expenditure or mandate the range into which the charter school must receive per pupil from the local school district.

In most states, the provision of State funding to a charter school results in a corresponding loss of funding to a local school district. For example, in Connecticut, which permits both "State" and "local" charter schools, "State" schools receive a per pupil allocation for each student enrolled in charter schools. However, the per pupil allocations of State funding to the local school district in which that student resides are reduced accordingly.[13] This loss of funding to a local district may itself create considerable tension between it and the charter school.

Another potential area of conflict relates to a local district's obligation to provide services to charter schools. Local school districts may find themselves faced with charter schools that enjoy a great deal of autonomy from local district control while paradoxically relying heavily upon the support services that local districts are obligated to provide. To the extent that a state legislature mandates the provision of support to charter schools, a local school district may find itself in the untenable position of underwriting significant costs and undergoing logistical battles associated with coordination of services to charter schools while lacking control over their management.

Some states mandate negotiation with a local school district over the provision of services such as special education, transportation, maintenance, food services, and other support services. In contrast, certain state legislation allows charter schools to take advantage of local school districts' services without requiring any negotiations. For example, in Massachusetts, a resident school district must provide transportation to children who attend the charter school and reside in the district where the charter school is located. In several other states, a local school district is required to provide transportation to charter school students on the same terms and conditions that it transports students to local district schools. At least one state, New Hampshire, acknowledges that it may prove more expensive for local school districts to transport students to charter schools. Therefore, New Hampshire's law dealing on transporting students in charter schools assigns the financial responsibility for "any added cost" for transporting charter school students to the charter schools.[14]

The Future for Charter Schools

Legislation relating to charter schools is still relatively new. While charter schools can work, the authors question whether the legislation enacted by many states will enable charter schools to implement true educational reform. As more states consider and reconsider charter school legislation in light of the experiences of some of the nation's pioneer charter schools, the authors anticipate a

need to modify charter school legislation in order to allow more flexibility, creativity and innovation in working toward the goal of educational reform.

Vouchers

Vouchers are, at least superficially, an even more revolutionary educational innovation than charter schools. Vouchers supposedly permit parents to take the money the state has set aside for education and to make their own decisions about where to spend those funds. Under vouchers, traditional educational interests, such as teachers' unions, state departments of education, and trained public school administrators have little or no control over where the state's money goes or what goes on in the schools that receive those funds. Theoretically, under a voucher system, market forces should determine which schools get most of the resources, and parents should select the most effective institutions. Under a true voucher system, the traditional educational interests might lose some or all of their influence. Perhaps for this reason, few states have thus far enacted voucher schemes. Moreover, potential legal challenges to vouchers, discussed below, may have also lead state legislatures to tread cautiously into this area.

For the purposes of this chapter, there are three main types of voucher systems. Public school voucher programs allow parents to choose among public schools only but permit students to cross traditional district lines. Nonsectarian voucher programs allow parents to choose among public and private nonsectarian schools but exclude all sectarian institutions. Full voucher programs allow parents to choose among public and private, sectarian and nonsectarian schools.[15] While all three systems are controversial, only the second and third types are generally subject to serious constitutional challenges. Yet, only these programs are likely to create the free-market pressures voucher supporters advocate.

Any voucher program which includes private schools is likely to be challenged under the Establishment Clause of the First Amendment if it includes sectarian institutions and under the Free Exercise Clause if sectarian institutions are excluded from a plan. Comprehensive voucher systems may also be questioned on state constitutional grounds. A number of state constitutions contain both educational guarantees and more rigorous standards for separation of church and state than the First Amendment. Until state and federal courts sort out these issues, any comprehensive voucher program is fraught with legal complications.

Public School Voucher Programs.

One model for vouchers is a limited public school choice program.[16] For example, the Kansas legislature has enacted a modified public school voucher program. The Kansas program has several interesting features. First, the program is voluntary; individual local school districts decide whether to participate in the program and with which other districts. Thus, a "receiving" school district, i.e., a district that decides to permit students from another "sending" district to enroll in its schools, may pick and choose from among the districts whose students it will take.[17] Similarly, even though most voucher programs provide state funding to parents, who in turn make payment to the school their child attends, the Kansas law requires the sending system to make payment directly to the receiving district.[18] This makes participation in the voucher program simpler, and therefore more attractive, to the receiving school.

In addition, unlike more comprehensive, parent-driven school choice programs, the Kansas plan leaves the final decision as to whether to allow the cross-district enrollment in the hands of a sending school board.[19] While a parent may request that his or her child be permitted to enroll in a receiving district pursuant to an inter district agreement, a board must find an appropriate reason for the cross-district enrollment. If the out-of-district enrollment is not in the "sending" district's best interests, the Kansas system allows the "sending" board to block the enrollment.

As innovative as it may be, the Kansas approach is limited in several ways: only public schools are included, any choice is limited to the "receiving" districts with which the "sending" district has reached an agreement, and the "sending" board of education can effectively veto any parent's decision. While this legislation does permit both parents and districts some flexibility, it hardly enshrines the free market approach urged by advocates of vouchers.

Puerto Rico has enacted a much more extensive public school voucher program which allows parents of students currently enrolled in public or private schools to select from among public schools.[20] Under the Educational Vouchers and Free Selection of Schools Program, students whose family income is $18,000 or less and who are enrolled in public and private schools may apply for vouchers of $1,500 or less for attendance at any public school. The vouchers are given to parents in the form of certificates of credit which they present to the schools where they enroll their children by choice. The receiving school then submits the certificate to the agency in charge of the program, which in turn pays the voucher amount to the school. The statute also requires the funds from the vouchers to

be used "to enrich [the school's] educational offerings and to finance expenses related to the rendering of its services to the [voucher] students."[21]

There are three important features to Puerto Rico's voucher scheme, some of which likely lessened opposition to the legislation from traditional educational interest groups. First, the money provided under for the voucher system is in addition to the receiving school district's regular budget as the legislation set aside ten million dollars in new money to finance the vouchers.[22] Consequently, unlike many of the more radical free market approaches to vouchers, Puerto Rico's statute does not enrich one school at another's expense. This effectively eliminates one of the most serious and oft-repeated criticisms of vouchers, that they take funding away from the poorly functioning schools that need it most. Second, only students at extremely low income levels are eligible for vouchers under the statute. This neutralizes the argument that vouchers provide assistance to those who could afford to pay for their choices, another common criticism of vouchers. Third, since Puerto Rico's voucher system benefits public schools only, it is much less of a threat to teachers' unions and other members of the public education establishment who typically oppose vouchers. Interestingly, Puerto Rico's first statute allowed parents to select both public and private schools to receive vouchers. As discussed below, the Supreme Court of Puerto Rico struck down the provision of vouchers to private schools in 1993.

In sum, both Puerto Rico and Kansas have enacted public school voucher systems. Yet, neither system provides for the type of across-the-board parent choice that advocates of vouchers seek.

Public and Private Nonsectarian and Full Voucher Systems

These two types of voucher systems allow parents to choose from among public schools and private schools. Nonsectarian systems exclude all schools with religious affiliation of any kind, while full voucher systems permit participation by sectarian institutions. Both types of voucher systems have been subject to successful court challenges.

Puerto Rico passed a statute provision regarding vouchers in 1993. This statute was identical to that currently in effect, and described above, with one exception: parents who received vouchers were permitted to select public or private schools for their children.[23] The Supreme Court of Puerto Rico struck that statute down without even reaching the church/state issue, holding that section 5 of Article II of the Constitution of the Commonwealth of Puerto Rico prohibited the use of any public funds to support any non-public schools, regardless of whether they

were sectarian.[24] Thus, in this case, the local constitution prohibited any form of private vouchers, regardless of the federal First Amendment issue.

The legislatures of Wisconsin and Ohio learned the hard way about the pitfalls of including, or excluding, sectarian institutions from voucher schemes. The cases from these states illustrate the myriad legal problems presented by voucher schemes.

In 1990, in response to overwhelming evidence about the poor performance of students in Milwaukee's schools, the Wisconsin legislature passed a statute permitting some students enrolled in Milwaukee public schools to attend private schools that elected to participate in the voucher program, at public expense. The law limited eligibility to students with family incomes of up to 1.75 times the federal poverty level.[25] In addition, enrollment in private schools was capped at a set percentage, designed to increase each year. Finally, the statute did not permit sectarian schools to participate in the program.

Five students who wished to attend sectarian schools under the program filed suit in federal court, claiming that the exclusion of sectarian institutions violated the Free Exercise Clause of the First Amendment.[26] A federal trial court disagreed, and upheld the exclusion of sectarian schools. In fact, the court went further than necessary in deciding the case and stated that Wisconsin could not have allowed participation of sectarian schools under the establishment clause. The students then appealed.

While the appeal was pending, despite its victory in the lower court, the Wisconsin legislature reversed field entirely and revised its statute to permit participation by sectarian schools.[27] In light of this change, the Seventh Circuit dismissed the previous challenge and vacated the lower court decision as moot. However, when advocates of strict separation of church and state challenged the new statute on the basis that it violated the Establishment Clause, the Supreme Court of Wisconsin was deadlocked at three votes in favor and three opposed to the implementation of the plan. On remand, an appellate court in Wisconsin struck the plan down on the ground that it violated the religious benefits clause of the state constitution. The case was again appealed to the Supreme Court of Wisconsin. This time, the court concluded that the Program was neutral and did not have the primary effect of advancing religion. It held that the Milwaukee Parental Choice Program violated neither the religious benefits clause of the state constitution nor the Establishment Clause of the Unites States Constitution.[28] The entire battle cast doubt on Wisconsin's system for eight years.

Ohio passed legislation designed to aid Cleveland's schools that was similar

to, but somewhat more extensive than, Wisconsin's. The Ohio statute established a program for students in the Cleveland Public Schools which granted scholarships for tuition in private school, or public schools in the surrounding area.[29] Students whose family income was two times the federal poverty level, or less, received ninety percent of the applicable tuition; students at higher income levels received seventy-five percent of their tuition. The program also provided tutorial assistance to some students who elected to remain in the Cleveland Public Schools.

The Ohio statute was well-designed to withstand legal and political challenges. Importantly, both public and all private schools were eligible to participate, eliminating any potential free exercise challenge. The provision for tutorial assistance of some Cleveland public school students awarded more money to that district, and therefore blunted criticism from traditional public school supporters. Finally, as in the Puerto Rico statute, the Cleveland plan provided additional money for the tuition vouchers, and did not withdraw money from the existing public schools. One problem with implementation of the plan proved fatal, however. Perhaps because the statute only provided up to ninety percent of the applicable tuition, no public schools outside of Cleveland elected to participate in the plan.

After a trial court upheld the plan, an appellate court in Ohio struck down the Cleveland plan.[30] The court held that the Cleveland plan violated both the Establishment Clause of the First Amendment and the Ohio Constitution.The court focused on two major issues. First, the court noted that no public schools had participated in the plan. Second, the court observed that eighty percent of the private schools participating in the program were sectarian. As such, the court held the program was unconstitutional because the plan and the failings of Cleveland's public schools produced an incentive for students to attend sectarian schools. This incentive, in the court's view, violated both the Establishment Clause and similar provisions of the Ohio Constitution. In 1999, the Supreme Court of Ohio held that the Voucher Program did not violate the Establishment Clause, reversing in part the appellate court's decision. The court found that the program had a secular legislative purpose and did not excessively entangle government with religion.[31]

Later the same year, a federal court ruled on the Ohio Voucher program. A federal trial court disagreed with the Supreme Court of Ohio's determination that the Voucher Program did not violate the Establishment Clause. The court held that in the absence of safeguards to ensure that the vouchers would only be used for non-sectarian instruction, the program created incentives for students to attend secular schools.[32]

Other state courts and attorneys general have rendered decisions about the constitutionality of voucher systems in advance of any legislation on the issue. For example, in 1987, in response to a request for an advisory opinion from the Massachusetts State Senate, the Supreme Judicial Court of Massachusetts handed down a holding that was similar to the one rendered by the Supreme Court of Puerto Rico. The court ruled that substantial aid to any private school, sectarian or not, would violate the Massachusetts Constitution.[33]

Vermont enacted a statute authorizing school districts to provide high school education to their students by paying for non-public schools selected by their parents.[34] The Chittenden Town School district had ninety-five students in grades nine through twelve. Instead of maintaining a high school for the education of those students, it paid tuition to public high schools outside of the district or approved independent schools. The town adopted a tuition-reimbursement policy that would allow tuition to be paid directly to sectarian schools. When the Chittenden School Board voted to allow tuition reimbursement to Mount Saint Joseph Academy, a parochial high school, the State Commissioner of Education terminated the state aid to education to the district.

The court held that the school district's tuition-payment system, which had no restrictions on funding religious education, violated the Compelled Support Clause of the Vermont Constitution. The court added that its determination was not at variance with the Free Exercise Clause of the United States Constitution because it would not force any student to choose between following the precepts of his or her religion and forfeiting benefits that would otherwise be available from the government.

In Maine, the statutory scheme permitted school districts that did not have public high schools to pay tuition for their resident students directly to public high schools in other districts or to non-sectarian private schools.[35] After the plaintiff parents were unable to obtain reimbursement for tuition paid to St. Dominic's Regional High School, a private, Catholic institution, they brought suit against the Maine Commissioner of Education asserting that the statute was unconstitutional. A federal trial court held that Maine was not constitutionally required to extend the subsidies to sectarian schools. The First Circuit affirmed in applying the direct versus indirect aid test, held that the program does not violate either the Free Exercise or Establishment Clause of the First Amendment.[36] The court also ruled against the plaintiffs with respect to their Equal Protection claim.

Similar to *Strout*, the plaintiffs in another Maine case were parents who elected to send their children to private Catholic school and sued when the district

would not reimburse them.[37] The Supreme Judicial Court of Maine held that if the statute did not exclude religious schools, it would violate the Establishment Clause. It stated that in that situation, the substantial unrestricted cash payments to religious institutions would have the impermissible "effect" of advancing religion. The dissenting judge wrote that the program in its present form violates the Equal Protection Clauses of the federal and state constitutions.

Insofar as forty-nine of the fifty state constitutions contain guarantees of free public education, virtually all voucher schemes may well be subject to state court scrutiny in addition to federal court challenges.

What Does the Future Hold for Vouchers?

Obviously, vouchers present a number of complex legal issues. First, any system that includes private schools will be subject to a First Amendment challenge, either under the Free Exercise Clause or the Establishment Clause. Until the United States Supreme Court provides further guidance in this area, the legal viability of any voucher plan that allows participation by private schools is impossible to predict.

Second, state courts are likely to interpret their constitutions in their own way and may impose additional restrictions on the participation of private schools. As the decisions of the Puerto Rico and Massachusetts courts indicate, state prohibitions on vouchers may be much more far-reaching that those imposed by the First Amendment. Thus, even if the Supreme Court renders a clear decision in this area, vouchers may have additional hurdles to clear.

Even in this legal environment, however, public school voucher programs will generally survive legal challenges. If structured to provide flexibility, benefits to both sending and receiving districts, and net new money for education, such programs can provide some effective choice for parents who are dissatisfied with local public schools, without harming already cash-strapped schools.

Conclusion

In the ongoing discussion and debate surrounding school reform, both charter schools and voucher plans are touted as providing potential for market-like school choice. In addition, many advocates claim that both reforms will free schools from what many perceive as a quagmire of regulations and limitations that hold schools back. Yet, to date, both reforms have presented problems of their own. State legislatures must avoid handicapping charter schools with the

same hyper-regulation that has hampered public schools but must also assure adequate control over these institutions. Additionally, the courts must provide legislatures guidance in developing voucher programs that will not run afoul of state and federal constitutional provisions before vouchers can play a major role in school reform.

Notes

1 References for this article include G. D. Andres, "Comment: Private School Voucher Remedies in Education Cases," 62 *Chi. U. L. Rev.*, 795 (1995); S. Beigel, "School Choice Policy and Title VI: Maximizing Equal Access for K-12", "Students in a Substantially Deregulated Educational Environment," 46 *Hastings L.J.*, 1533 (1996); Note: "The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality," 109 *Harv. L. Rev.*, 2002 (1996); Note: "School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test," 70 *St. John's L. Rev.* 273 (1996); P. J. Perla, Comment: "The Colorado Charter School Act and the Potential for Unconstitutional Applications Under Article XI, Section 15 of the State Constitution," 67 *U. Colo. L. Rev.* 171 (1996); J. Price, Note: "Educational Reform: Making the Case for Choice," 3 *Va. J. Soc. Pol'y & L.*, 435 (1996).

2 *See U.S. Charter Schools* (last modified Oct. 1, 1999) <www.uscharterschools.org>. The states are: Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Wisconsin, and Wyoming.

3 Arkansas, New Hampshire, Virginia, and Wyoming currently have charter school laws but no charter schools.

4 1995 Kan. AG. LEXiS 124, *2.

5 K.S.A. § 72-1906 (1999).

6 N.J. Rev. Stat. § 18A : 36A-14(b).

7 Minn. Stat. § 120.064 Subd. 20.

8 14 Del. C. § 507(c).

9 Mich. Comp. Laws § 380.505(l).

10 N.C. Gen. Stat. § 115C-238.29F(e)(l).

11 N.H. Rev. Stat. § 194-B:14 IV.

12 Colo. Rev. Stat. § 22-30.5112(2)(c)(1999).

13 Conn. Gen. Stat. § 10-66ee.

14 N.H. Rev. Stat. § 194-B:2(IX).

15 For a good general description of voucher programs, see Bodemer, "School Choice through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test," 70 *St. John's L. Rev.*, 273 (1996). While the author advocates full voucher systems, and underestimates the potential success of a First Amendment challenge to such systems, the article contains a useful discussion of the history of voucher and school choice programs.

16 A number of school districts have instituted limited in-district school choice programs. These programs are beyond the scope of this article. However, such programs seldom produce any significant legal problem, unless they weigh applications on a discriminatory basis, such as race or gender.

17 K.S.A. §§ 72-1046, 72-1046a, 72-6757; cf. K.S.A. §72-8233 (permitting transfer of entire grade or grades from one district to another by agreement, as a regionalization effort).

18 K.S.A. § 72-6757(e)(2).

19 K.S.A. § 72-6757(e)(1).

20 P.R. Laws § 81 (1995).

21 *Id.*

22 An additional program, providing support to certain students who take advanced placement courses at post secondary institutions, is also financed out of this ten million dollar appropriation.

23 1995 PR ALS § 81.

24 *Asociacion de Maestros de Puerto Rico v. Torres*, 94 J.T.S. 145 (1994).

25 1990 Wis. Laws §119.23.

26 *Miller v. Benson*, 878 F. Supp. 1209 (E.D.Wis. 1995).

27 1995 Wisconsin Act 27. The Supreme Court of Wisconsin later invalidated certain aspects of Act 27 as violative of the Wisconsin Constitution. This decision did not involve the voucher provisions, however.

28 *Jackson v. Benson*, 578 N.W. 2d 602 (Wis. 1998).

29 Ohio Rev. Code. Ann. § 3313. 975 (Anderson 1997).

30 *Simmons-Harris v. Behr*, 1997 Ohio App. LEXIS 1766 (1997).

31 *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

32 *Simmons-Harris v. Zelman*, 72 F. Supp.2d 834 (E.D. Ohio 1999) (At this point, since Goff is no longer the Superintendent, the caption refers to Dr. Susan Tave Zelman as Superintendent of Public Instruction).

33 *Opinion of the Justices to the Senate*, 514 N.E.2d. 353 (Mass.1987).

34 *Chittenden Town Sch. Dist. v. Vermont Dep't of Educ.*, 738 A.2d 539 (Vt. 1999).

35 *Strout v. Commissioner, Maine Dep't Educ.*, 13 F. Supp.2d 112 (D. Me. 1998).

36 *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 329 (1999).

37 *Bagley v. Raymond Sch. Dist.*, 728 A.2d 127 (Me. 1999), *cert. denied*, 120 S. Ct..324 (1999).

EMPLOYMENT **ISSUES**

Supervision & Evaluation of School Personnel

—

Employee Rights

CHAPTER EIGHT

Supervision and Evaluation of School Personnel

■ by C. Daniel Raisch

Beginning with the inception of compulsory attendance laws in public education in the United States in the mid 1800s, school personnel have been supervised and evaluated by local board members and/or administrators.[1] As schooling has become more institutionalized, the supervision and evaluation process has become more prescriptive. Moreover, this formalization of the evaluation process has been accompanied by an increased awareness of the potential losses school personnel could incur in light of negative evaluations.[2] As a form of protection against perceived improper supervision, transfers, or recalls, and/or negative evaluations that often resulted in dismissals, school employees sought legal redress. Consequently, most public school employees are now covered by an array of statutory procedures that school administrators must adhere to when managing, supervising, and evaluating personnel.[3]

Beyond conducting and overseeing evaluations, the non-renewals of contracts, and the dismissals of employees, administrators encounter the difficult task of deciding their staffing needs for the coming year. As part of this process, administrators must consider a wide range of issues including a staff member's competence, classroom management abilities, instructional performance, rights, and privilege in relation to evaluation documents when deciding the future of their employees. Insofar as the supervision and evaluation process may impact upon the size of a staff,[4] it is important to have specific policies in place to help ensure a school's efficient operation.

Litigation has proliferated concerning issues relating to the processes and procedures used by administrators as they supervise and evaluate their staffs. In addition,

establishing criteria for supervision and evaluation of personnel has created additional disputes between school boards, administrators, and employees. In light of these concerns, this chapter describes the major issues confronting school employees and administrators concerning the management, supervision, and evaluation of educational personnel. Understanding how the legal system has resolved some of these complex issues should be of assistance in administrative decision-making.

This chapter begins by reviewing certain basic assumptions related to supervision and evaluation. Among these assumptions is the concept that the management, supervision, and evaluation of employees is not confined to personnel performance and behavior in specifically defined jobs but can extend to such other areas of cooperation with administration, relationships with parents and other staff, outside employment, or personal conduct. The chapter next considers the various types of supervision and evaluation. In particular, the chapter explores formative and summative observations and evaluations, statutes, and regulations. Such a discussion is warranted as these issues often prove to be confusing and lead to litigation.

Management, Supervision, and Evaluation

The supervision and evaluation of faculty and staff generally involves the process of establishing standards and written performance criteria. A key element in this process is gathering information relating to performance and reviewing data in order to determine the degree of an employee's effectiveness. On the basis of supervision and evaluation, at least as it relates to non-tenured staff members, these efforts are ordinarily directed at improving performance or lead to a determination whether to non-renew or terminate their contracts. As such, supervision and evaluation cases have become a major component in the field of education law.[5]

Policy Development

It is imperative for each school system to have policies on supervision and evaluation that have been approved by their boards since districts leave themselves subject to legal action in the absence of such written directives. For example, in a case from Ohio, a local board's failure to follow state law requiring it to adopt evaluation procedures warranted the reinstatement of an ineffective non-tenured teacher.[6] Consequently, the policy and procedures should be crafted so as to determine and specify the competencies, skills, and conduct required of personnel being supervised and evaluated.[7]

In many states, evaluation policies are required by statute while in others collective bargaining dictates evaluation procedures.[8] Regardless, policies and procedures must be written in understandable language and reviewed by all stakeholders before they are approved and implemented. Failure to establish evaluation policies and procedures with clearly defined standards of performance leaves administrators open to the charge of arbitrary and capricious conduct. In fact, such a charge of arbitrary conduct may even raise the inference that the administration has kept its evaluation policies and procedures hidden in order to discriminate against employees.

As important as it is to have policies and procedures which are relevant to employment decisions, difficulties surface when they are not uniformly administered. When evaluations are necessary but not conducted uniformly, an adversely affected employee may contend that an employment decision is invalid and unsupported by the evidence. Such a claim may be based on the argument that the terms of employment include the right to be supervised and the right to have a reasonable amount of time, and perhaps support, to improve unacceptable performance. The failure to have such essential conditions may invalidate any form of discipline or dismissal if based on reasons that would be appropriate to evaluation.[9]

Methods of Supervision and Evaluation

The most commonly used method among the many options used to supervise and evaluate school personnel are those conducted by administrators or supervisors, peers, one's self, students, and parents.[10] Administrative evaluations involve the observation of faculty and staff by using a set of criteria usually agreed upon by the supervisor and the employee. The standards are usually established through an ongoing negotiation and collaboration process conducted between an employee's association and the administration. The observations are conducted in an employee's place of work, usually the classroom, or in the case of a non-teaching employee, their normal work settings.

Peer review, although resisted by many teachers' unions, refers to the observation of employees by a colleague. This method is based on the assumption peers are in the best position to evaluate another employee because they are themselves subject to some of the same evaluative criteria for effectiveness, have greater opportunity to conduct day-to-day observations, and possess the special expertise to make judgments regarding performance.[11]

Self-evaluation has met with mixed results. However, Glickman[12] recommends

the use of self-assessment as a means of ensuring how the employees perceive themselves is consistent with how others perceive them. This is also a very useful, yet, non-threatening method to use. The results of the self-evaluation should be shared with another professional in an effort to produce positive changes.

Allowing students to evaluate teachers, although common in higher education, is at best controversial in elementary and secondary education. One assumption for using student feedback is that students see teachers and other employees every school day and are therefore daily consumers and are entitled to some input into the evaluation process. Involving students in teacher evaluations, through student reports, surveys, systematic interviews, and focus groups can make positive changes in teacher-student relationships. Although evidence indicates some chance for destructive opinions, there is a greater likelihood of an expression of appreciation for a teacher's performance.[13]

Teachers' connections with parents cover a wide range of activities. Some teachers desire considerable distance from parents because they view their primary work and responsibility as being with students. Other teachers resent intrusions in their work schedules when parents break into their days and disrupt instruction. Involving parents in teacher evaluation, through parent reports, surveys, interviews, and focus groups changes these relationships. In general, greater involving of parents in teacher evaluation can help to make teacher-parent relationships more positive because such an approach can make parents even more involved in the education of their children.

The methods utilized to observe and evaluate staff should include standards which are understood and approved by both the employee and the administration. Standards may include knowledge of subject, pedagogy, organization, management, evaluation of students, professional responsibilities, student/parent/administration relationships, and personal qualities. Further, evaluations may focus on particular areas of performance but should support strengths while addressing areas in which an employee may be deficient or is having difficulties.[14]

Purpose of Supervision and Evaluation

The purpose of supervision and evaluation varies depending upon both who initiates the process and the audience to whom it is addressed. On a general level, the stated purposes of supervision and evaluation are usually to improve performance such as classroom instruction by a teacher or greater management of

students by a bus driver.[15]

There are two basic forms of supervision and evaluation, formative and summative, each of which serves a distinct purpose. Although the courts have not articulated this formative/summative distinction clearly, this consideration is implied by the underlying purposes of supervision and evaluation as reflected by statute, policy, or contract.[16]

Formative observations are important from an educational organization's point of view even if they are less significant from a legal standpoint.[17] This form of observation should be used to guide teachers or other employees in improving their professional skills. Summative evaluations, on the other hand, are usually conducted as a basis for employment status decisions such as whether performance warrants retention, non-renewal, dismissal, promotion, or the awarding of tenure.

If formative observations are used primarily to improve performance and only incidentally for the purpose of retention or dismissal decisions, failure to follow procedures is less likely to weaken a personnel decision.[18] Formative observations should not be considered evaluations; rather, they should be viewed as a subset of the evaluation process. Generally, observations are undertaken with the expressed purpose of judging overall effectiveness and performance of an individual faculty or staff member as compared with deciding whether an employee has met the minimum competencies expected.

Using the terms supervision and evaluation interchangeably is a major reason why there is so much confusion and why unclear policies and procedures lead to litigation. In fact, in a case where a policy stated that evaluations should be made, this fact did not give a non-tenured employee a constitutionally protected property right in the renewal of her contract where evaluations/observations were not conducted.[19]

Summative evaluation refers to the procedure that uses observation data to make final personnel decisions. Evaluation procedures specifically designed to apply to employment determinations must be vigilantly followed as they confer important rights on an individual that must be strictly adhered to.[20] Tenured employees usually have distinctive rights in the summative process although some notable exceptions involving non-tenured employees do exist.[21] Where evaluation is mandatory under statute, state rule, local policy, or contract, it may be a jurisdictional prerequisite to an employment action. Formal evaluation of this sort affords school employees some measure of job protection by requiring that they are evaluated properly and informed with regard to job performance so that defi-

cient performance may be corrected. To a great extent, observations and evaluations serve a function similar to a warning or remediation notice before faculty or staff are disciplined or dismissed.[22] When observations are conducted properly, supervision can serve to help correct deficiencies. Well-trained and experienced supervisors understand that changes in behavior take time and commitment from both the employee and supervisor.

Supervision and Evaluation Procedures

Supervision and evaluation often simultaneously make up what is considered to be both a formal and informal process. In the formal case, it is a process that follows prescribed policies and procedures that should include approved forms, agreed upon time lines, acceptable taping (audio or video), and approved supervising personnel. In addition, informal procedures such as management-by-walking-around, informal observations, and effective listening techniques can be used to confirm formal observations.[23]

In general, the courts have not expected validation of evaluation instruments. Instead, the courts have recognized that an evaluation of teacher competence is necessarily a highly subjective determination that does not easily lend itself to precise qualifications for judicial review.[24] It should be observed, though, that past rulings from the courts does not necessarily mean that future decisions will be as permissive. Therefore, it would be unwise not to validate all evaluation instruments. There are a number of objective evaluation instruments available regardless of the evaluation methods used.[25]

The use of standardized testing, especially competency tests, has proven to be one of the most controversial methods of evaluation. Only a few states require educators to pass a competency test to retain a teaching license. Even so, many states use competency tests as a prerequisite to the issuance of an initial teaching license. A number of questions permeate the case law on competency testing. First is the central importance of the validity of such tests. Second is the concern held by courts with respect to the disproportionate effect such tests have on a particular class of persons. A final noteworthy concern is the pervasive attitude of judicial consideration and deference to the decisions of educational policymakers.[26] As a result, if used judiciously and with a clearly identified purpose, testing is a tool that can serve to help both an educator and a supervising administrator make decisions that could positively guide the educator's future.

Content and Constitutional Requirements

Courts are hesitant to find procedures mandatory or even applicable to employment decisions unless they are clearly defined. Historically, the evaluation process has not been considered a necessary condition for an employee among other employment actions.[27] At the same time, substantial compliance is considered adequate where evaluation is required because courts will not allow even slight technical procedural oversights to thwart decision-making, provided an employee is given adequate notice that his/her job performance needed improvement.[28]

The basic components of a legally defensible supervision and evaluation system should include predetermined job-related standards for assessing performance, repeated observations and evaluations to confirm deficiencies, notice of the deficiencies, opportunity and support to improve performance, and time to remediate the deficiencies. One court used a two-prong test for determining remediability. The test required whether damage had been done to the students, faculty, or school, and whether the conduct resulting in that damage could have been corrected had the administrators warned the teacher.[29] In general, employees who are more senior in teaching experience and who possess tenure are typically extended more time in which to address a remediable deficiency.[30]

Evaluations are especially significant in the dismissal of employees based on incompetence.[31] Often, problems with tenured employees arise yet are never mentioned in the observation or evaluation data. It is important to list areas of concern in writing for failure to do so may suggest satisfactory performance.[32] Lack of proper evaluations does not deter personnel actions for reasons unrelated to those being evaluated.[33]

Regardless of the circumstances, when administrators are involved in the evaluation of educators, they must follow procedural due process. Procedural due process includes the use of an evaluation instrument that is objective and that provides adequate notice to the educator of the standards that will be used and an opportunity to understand the standards. In addition, a tenured educator must be given an opportunity to remediate (time and assistance) deficiencies cited in an evaluation. Finally, tenured teachers must have a reasonable expectancy that their positions will be continuous. Such expectations of a continuing contract is the meaning of tenure, courts have help that this is a sufficient property right to warrant the protection of the due process.[34] Probationary, or limited contract, teachers have no claim to a property right.

Plans and Time for Improvement

Once an employee has been identified as needing remediation, it is critical to have plans and procedures in place to make sure that he or she has both the time and assistance to improve. Some states allow both procedural and substantive challenges often providing for review or appeals panels.[35] Generally, the time to improve is considered in terms of months, not weeks or days.[36] For example, an employee who has been repeatedly notified of late reports to the principal's office might be given until the end of the following term before progressive discipline measures are fully implemented. This does not mean that more serious offenses should not be dealt with in a much shorter time period. Some deficiencies related to competency may be regarded as irremediable. Consequently, for example, a teacher with poor classroom management skills that could cause injuries to students may not be given as much time to improve as a teacher who files late reports. In considering the nature of the deficiency, courts typically weigh the property interest of an employee, giving consideration to the length of time that may be necessary to correct the deficiency in relationship to the possible harm for school children should the employee be permitted a period of remediation.[37] It should be noted that other rights, such as privilege, can come into play in the process of supervising and evaluating employees.

Privilege

Comments made during the evaluation process by school administrators, even if not correct, are usually given some degree of privilege or immunity. The defense of privilege is predicated on the public policy that in occasions where there is enough public interest in encouraging uninhibited freedom of expression to require the sacrifice of the right of the individual to protect his reputation by civil suit, the law recognizes that false, defamatory matter may be published without civil liability.[38] Privilege can be distinguished from immunity in that rather than providing a defense for an admitted defamation, the statements are deemed never to have been defamatory in the first instance. Moreover, the defense is more closely linked to the occasion on which the statement was made than to the identity of the person making the statement.

It is important for school officials to have a clear understanding of statutes related to issues dealing with privilege/immunity. Whether privilege or immunity applies generally depends on the applicable defamation statutes or case law in a given state. Consequently, it is critical for administrators to under-

stand state school law statutes. One state supreme court decision[39] held that a superintendent had absolute protection because his remarks, which led to the non-renewal of a teacher's contract, were made public at the request and with the consent of the plaintiff who requested reasons for such action at a public meeting. The court was satisfied that the superintendent stated very specific reasons for the dismissal action.

An additional issue to consider is whether a speaker has made a statement of fact or opinion. Courts have usually held that personal opinions, as well as true statements, are protected. Usually, only statements of fact may serve as a basis for liability in a defamation suit. It is important for administrators to be accurate with the statements made about employees in public. Any comments that may harm an employee's reputation must be substantially true if an administrator is to be protected in a defamation case. Educational administrators should always exercise both caution and discretion with regard to dispensing personnel information.

Employee Discipline

Just as boards of education have the right to hire employees, they also have the right and responsibility to discipline staff members.[40] A progressive discipline decision could cover a wide range of actions, including reprimand, verbal or written, suspensions, with or without pay, demotion, or dismissal. Unless an employee's conduct is so extreme that a single instance would justify cause for dismissal, the range of discipline usually follows the standard progressive pattern. Under this system, an employee could be given notice of the unacceptable conduct. If the conduct continues, the discipline can escalate through suspension to dismissal.

Statutes and case law vary on grounds for dismissal. Most statutes include immorality, insubordination, neglect of duty, incompetence, and other good and just causes as reasons for dismissal. Dismissal for cause may be undertaken against either tenured or non-tenured employees. A board may wait for the expiration of the contract of a non-tenured employee and give notice of intent to non-renew. In practice, boards wait until the end of an employee's contract before deciding to non-renew. In effect, this allows an employee the opportunity to complete the school year and provide the board with the opportunity to replace the person when the contract expires rather than face a potential challenge for violating due process.

Insofar as an employee's contract may include a property right, dismissal requires a board to provide an individual with due process that includes notice

and a hearing at which the board must determine whether there is good and just cause for a dismissal action. Public employees with property rights in continued employment are entitled to notice of charges against them, an explanation of the evidence, and an opportunity to present reasons why they should not have their contracts terminated. The Supreme Court held that minimal due process under the provisions of the Fourteenth Amendment guarantees a tenured school employee a right to a pre-termination hearing that should determine if there are reasonable grounds to believe that the charges against the employee are true and supported by evidence.[41]

Conclusion

The process of observation, supervision, and evaluation of school employees can be a very complex, often confusing undertaking with expectations that all educators must learn to work with. School administrators must be cautious to follow minimum fairness guidelines in making sure that all employees have proper notice, assistance, and time to make necessary improvements for their continued employment. Employees have an expectation of following reasonable procedures, guidelines, and time commitments, as well as a right to expect reasonable assistance to improve performance. Additionally, they have the responsibility to exhibit reasonable improvement in their performance. If administrators and staff work together to improve supervision, then the most important people in the process, students, will benefit.

Notes

1 Rossow, L. F. and J. Parkinson, *The Law of Teacher Evaluation*, NOLPE, (1992).

2 Beckham, J., *Meeting Legal Challenges*, Technomics, (1996).

3 Peterson, K. D., *Teacher Evaluation: A Comprehensive Guide to New Directions and Practices*, (1995).

4 *See* Rossow and Parkinson, *supra* note 1.

5 Frells, K. and J. L. Horton, *A Documentation System for Teacher Improvement or Termination*, (1994).

6 *Farmer v. Kelleys Island Bd. of Educ.*, 594 N.E.2d 204 (Ohio Com. Pleas 1992).

7 *Teboro v. Cold Spring Harbor Cent. Sch. Dist.*, 510 N.Y.S.2d 665 (N.Y. App. Div. 1987).

8 Webster, W.G., *Effective Collective Bargaining in Public Education*, (1985).

9 *Roberts v. Lincoln County Sch. Dist. No. One*, 676 P.2d 577 (Wyo. 1984).

10 Glickman, C. D. and S. P. Gordon, and J. M. Ross-Gordon, *Supervision of Instruction* (3d ed. 1995).
11 Rapp, *Education Law*, vol. 1., (1999).
12 *See* Glickman et al. *supra* note 10.
13 *See* Peterson, *supra* note 3.
14 *Eshom v. Board of Educ.*, 364 N.W.2d 7 (Neb. 1985).
15 *See* Glickman et al., *supra* note 10.
16 *See* Rapp, *supra* note 11.
17 *Board of Educ. v. Ballard*, 507 A.2d 192, 196 (Md. Ct. Spec. App. 1986).
18 *Willis v. Winefield Sch. Dist. No. 3*, 603 P.2d 962 (Colo. Ct. App. 1979).
19 *Roberts v. Lincoln County Sch. Dist. No. One*, 676 P.2d 577 (Wyo. 1984).
20 *Wilt v. Flanigan*, 294 S.E.2d 189, 194 (W.Va. 1982).
21 *See* Beckham, *supra* note 2.
22 *Board of Educ. v. Ballard*, 507 A.2d 192, 196 (Md. Ct. Spec. App. 1986).
23 *Eshom v. Board of Educ.*, 364 N.W.2d 7 (Neb. 1985).
24 *Beauchamp v. Davis*, 550 F.2d 959 (4th Cir. 1977).
25 *Cangelosi, J.S., Evaluating Classroom Instruction*, (1991).
26 Rossow and Parkinson, *supra* note 1, No. 42.
27 *Anaclerio v. Skinner*, 134 Cal. Rptr. 303 (Cal. Ct. App. 1976).
28 *Governing Bd. v. Commission*, 217 Cal. Rptr. 457 (Cal. Ct. App. 1985).
29 *Gilliland v. Board of Educ.*, 365 N.E.2d 322 (Ill. 1977).
30 *Ganyo v. Independent Sch. Dist.*, 311 N.W.2d 497 (Minn. 1981).
31 *Eshom v. Board of Educ.*, 364 N.W.2d 7 (Neb. 1985).
32 *See* Rapp, *supra* note 11.
33 *Illinois Educ. Assn. v. Board of Educ.*, 340 N.E.2d 7 (Ill.1975).
34 *Board of Regents v. Roth*, 408 U.S. 564 (1972).
35 *Thompson v. Board of Educ.*, 838 S.W.2d 390 (Ky. 1992).
36 *DeOliveira v. State Bd. of Educ.*, 511 N.E.2d 178 (Ill App. Ct. 1987).
37 *Knapp v. Whitaker*, 577 F. Supp. 1265 (C.D. Ill. 1984).
38 *Bigelow v. Brumley*, 37 N.E.2d 584, 588 (Ohio 1941).
39 *Williams v. School Dist. of Springfield*, R-12, 447 S.W.2d 256 (Mo. 1969).
40 Beckham, *supra note 2.*
41 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

CHAPTER NINE

Employee Rights

■ by David L. Gregory & Laurie Ann Martino

The rights of employees in school settings increasingly implicate claims of statutory and constitutional civil rights protections, often eclipsing more conventional labor relations issues in the context of the more familiar grievance-arbitration mechanism of collective bargaining. Thus, this chapter examines salient, state-of-the-art employee rights in school settings, including the Family and Medical Leave Act, sexual harassment, and the Americans with Disabilities Act.

The Family and Medical Leave Act

Legislative History

Enacted on February 5, 1993, the Family and Medical Leave Act (the Act or FMLA) was the first legislation that President Clinton signed into law. The FMLA was inspired by three significant developments. First, the number of women in the workforce had increased drastically. More specifically, the number of women either working or seeking employment had increased 200 percent since 1950. The number of women in the workplace who were raising, or had raised children, also increased dramatically.[1] Second, the number of single parent families grew. In 1988, single parent families had increased to twenty-seven percent, doubling the percentage in 1970. Third, America is aging as the number of people who are seventy-five or older increased by a third since 1980 and approximately twenty percent of working Americans care for an older relative. A Congressional study also noted that:

1. the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly

2. it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions
3. the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting
4. there is inadequate job security for employees who have serious health conditions tnat prevent them from working for temporary periods
5. due to the nature of the roles of men and women in our society, with the primary responsibility for family care-taking often falling to women, it typically affects their working lives more than those of men.[2]

Thus, the FMLA was enacted to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote the national interests in preserving family integrity."[3]

Overview of the Family and Medical Leave Act

The FMLA requires employers of fifty or more workers to provide up to twelve weeks of unpaid, job-protected leave to eligible employees for specified family and medical reasons. At the same time, employers must maintain an employee's pre-existing group health insurance coverage during the leave and restore an eligible employee to the same or equivalent position at the conclusion of the FMLA leave.[4]

Scope of the Statute

1. Coverage: Employers

Title 1 of the FMLA requires employers to provide these benefits to "eligible employees." The Act defines an employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year."[5] Employer includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer, and successor in interest of an employer, and any 'public agency.'"[6]

Employers are exempt from the Act if they have fifty or fewer employees in one location, but are covered if they employ fifty individuals within a seventy-five mile radius of the work site.[7] Once an employer is covered, it remains so until it retains fewer than fifty employees for twenty or more calendar work weeks in the current or preceding year. The determination of whether he or she is subject to

the fifty employee rule is made when an employee requests leave. Once an employer is covered, an employee's eligibility is not affected by later changes in the size of the workforce.

2. Leave Entitlements

The essential function of the FMLA is to provide job security; an employee may attend to family responsibilities with the knowledge that his or her job is secure. Eligible employees are entitled to a total of twelve weeks of leave during any twelve month period for one or more of the following reasons: the birth of a child; having to care for a new born; the placement of a child in an employee's care due to an adoption or through foster care; having to care for a spouse, son, daughter, or parent of the employee who has a serious health condition; the employee is unable to perform the functions of his or her position due to a serious health condition.[8]

If a husband and wife work on the same job, an employer may limit the aggregate number of weeks allocated to the couple for leave purposes. If leave is taken due to the birth or adoption of a child or to care for a sick parent, the couple is entitled to no more than twelve weeks. There is no limitation if leave is taken to care for a non-newborn child or to look after each other. Employers have the right to require reasonable documentary proof of the required relationship from an employee who requests FMLA leave to care for a family member.

Intermittent or reduced leave is also possible under the FMLA if it is taken at separate time intervals due to a single reason. Reduced leave decreases an employee's normal hours of work per week or per day. Intermittent leave due to the birth or adoption of a child may not be taken without an employer's approval. Moreover, intermittent or reduced leave cannot be taken when medically necessary without an employer's consent.

An employer may require a second opinion if there is any doubt about the validity of an employee's condition. If an employee takes intermittent or reduced leave, an employer may temporarily transfer the worker to an alternative position for which he or she is qualified with equivalent pay and benefits. Intermittent or reduced leave is counted proportionately against the twelve weeks allowed under the Act.

3. Serious Health Condition

According to the FMLA, a serious health condition is an illness, injury, impairment, or physical or mental condition that involves either in-patient care in a

hospital, hospice, or residential medical care facility, including any period or subsequent treatment in connection with in-patient care. The term also covers continuing treatment by a health care provider.

A serious health condition involving continuing care includes any one or more of the following:

(i) a period of incapacity of more than three consecutive calendar days and any subsequent treatment or period of incapacity relating to the same condition that involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under the direct supervision of a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) any period of incapacity due to pregnancy, or for prenatal care

(iii) any period of incapacity or treatment of such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) requires periodic visits for treatment by a health care provider

(B) continues over an extended period of time.

(iv) a period of incapacity which is permanent or long term due to a condition for which treatment may not be effective.[9]

4. Compensation During Leave

Generally, FMLA leave is unpaid. However, the Act provides that, under certain circumstances, an eligible employee may elect, or an employer may require, a worker to substitute accrued paid vacation leave, personal leave, or family leave for FMLA unpaid leave. Under the FMLA, an employer is required to designate leave as paid or unpaid. An employee does not expressly have to assert his or her leave as FMLA to fulfill the obligation of providing notice. An employer must designate leave as FMLA before it begins.

5. Benefits that the Employee is Entitled to During Leave

According to the FMLA, taking leave will not result in the loss of any employment benefits earned prior to taking leave or penalize those who take leave. As such, the Act is intended to ensure that benefits resume when an employee returns to work. Seniority and other employment benefits do not accrue during

the leave. An employee who is on leave is entitled to continued coverage under an employer's health insurance plan. If an employee is ordinarily required to pay all or part of health care premiums, he or she must continue to do so while on leave.

6. Reinstatement

Upon exhausting the twelve weeks of leave, an employee must be reinstated to his or her prior position or to an equivalent job.[10] An equivalent position must involve the same or substantially similar duties and responsibilities while entailing substantially equivalent skills, effort, responsibility and authority. Restoration to an equivalent position requires it to be in the same or proximate geographical area where an employee had previously worked. An employee who returns from FMLA leave is entitled to have all of his or her previous benefits restored to the same level as before the leave was commenced.

Reinstatement following FMLA leave does have limitations. First, upon returning, an employee has no greater rights to reinstatement or benefits and conditions than if he or she had not taken leave. Second, if an employee was hired for a specific term, and the project has ended, an employer is not required to reinstate the worker if the employer did not intend to retain the individual upon the completion of the job. Third, a "key employee," defined as a "salaried eligible employee who is among the highest paid ten percent of the employees employed by the employer within seventy-five miles of the facility at which the employee is employed,"[11] may be denied restoration if this would help to avoid serious and grievous economic injury to the employer's business operations. Finally, an employer is not required to reinstate an employee if the maximum amount of leave has been taken and the worker is still unable to return to work.

7. Notice

All covered employers must post notice in the work place explaining the FMLA's provisions and the procedures for filing complaints. If an employer provides a handbook that discusses employee benefits, it must state FMLA rights and responsibilities as well as policies pursuant to the Act. When leave is foreseeable, an employee must provide at least thirty days notice. If an employee cannot give thirty days notice for leave over the birth or placement of a child or the need for medical treatment, then he or she should give as much notice as is practicable. In taking foreseeable leave to care for one's own illness or that of a family member based on planned medical treatment, an employee must make a rea-

sonable effort to schedule treatment that does not unduly disturb the employer's business. If an employee fails to give required notice for foreseeable leave and/or provide a reasonable excuse, an employer may deny leave until at least thirty days after the date when the worker submits proper notice.

8. Certification

If an employee requests leave due to his or her own serious health condition or to care for a seriously ill spouse, child, or parent, an employer may require the worker to provide medical certification. The form for obtaining medical certification is provided by the United States Department of Labor. While an employer may not request additional information from an employee's health care provider once the completed medical certification is received, with the worker's consent, the employer's health care provider can clarify and authenticate the medical certification. If an employer doubts the validity of an employee's medical certification, the employer may obtain, at his or her own expense, a second opinion.When leave is foreseeable, and the thirty days' advance notice has been given, an employee should provide certification before going on leave. If a leave is unforeseeable, an employee must provide medical certification within the time requested by the employer or as soon as is reasonably practicable. Failure to provide timely certification for foreseeable leave may result in its being delayed until certification is provided. In the case of unforeseeable leave, failing to provide certification may result in prolonging the delay. Leave does not qualify under the FMLA if certification is never provided.

9. Enforcement

The Wage and Hour Division of the Department of Labor has investigative authority to enforce the FMLA. An employee who wishes to enforce the Act may bring a complaint with the Department of Labor or can file a private cause of action. The statute of limitations for such a claim is two years from the date of the last event constituting the alleged violation of the Act. Damages available under the FMLA are wages, employment benefits, or other compensation denied or lost due to the violation. Where wages, benefits, or other compensation have not been denied or lost, an employee may recover actual monetary losses for up to twelve weeks of wages or salary; interest on this amount calculated at the prevailing rate; liquidated damages, where deemed appropriate; equitable relief such as reinstatement or promotion; and reasonable attorneys fees.

10. Miscellaneous provisions

An employer may not discriminate against any employee who asserts rights under the FMLA. Interfering with an employee's attempt to exercise rights is similarly prohibited.

Education Regulations

1. Special Rules Apply

Special regulations were created for the application of the FMLA to primary and secondary schools and systems, both public and private. These regulations do not apply to colleges, trade schools, and preschools. Public schools and local educational agencies are covered regardless of the number of their employees. In order to be covered by the FMLA, educational personnel must work at a site where at least fifty employees are employed within a seventy-five mile radius.

The special rules for school personnel apply to instructional employees, whose "principal function is to teach and instruct students in a class, a small group, or an individual setting."[12] This includes teachers, athletic coaches, driving instructors, and special education assistants but not teacher's assistants or aides, counselors, psychologists, or curriculum specialists.[13] The special rules also do not apply to cafeteria workers, maintenance workers, and bus drivers.

2. Special Leave Rules for Instructional Personnel

a. Limitations on taking intermittent leave or leave on a reduced schedule

When a leave ends with a school year and begins with the next semester, it must be taken consecutively, not intermittently.[14] The intervening summer vacation is not counted against an employee's leave entitlement since the individual would not have been required to work. If leave is taken at the end of a year, an employee must be provided with the benefits that any staff member who had worked until that time would have received.

If an employee requests intermittent leave or a reduced schedule to care for a family member or one's own serious health condition based on a foreseeable planned medical treatment and his or her absence encompasses more than twenty percent of the total working days, a school has two options.[15] First, a school may require an employee to choose either to take leave for a period of a particular duration no longer than the length of the planned treatment. Second, a school may temporarily transfer an employee to another job for which he or she is qualified in order to better accommodate the leave period.[16] The latter choice requires a transfer to a position with equivalent pay and benefits.[17]

An instructional employee is required to give notice of a foreseeable FMLA leave. If an employee does not give notice, an employer may choose the above-mentioned options. An employer may also delay an employee from taking leave until the notice provision is met.[18]

b. Taking Leave Near the End of an Academic Term

If an instructional employee requests leave near the end of a school term, three different rules apply.[19] First, if an employee begins leave more than five weeks before the end of a term, school officials may require an individual to continue taking leave until the end of a term if it is at least three weeks long and the employee's return would occur during the three week period prior to the end of the term.[20] Second, if an instructional employee begins leave for a purpose other than his or her own serious health condition and less than five weeks before the end of the term, administrators may require the staff member to continue taking leave until the end of the term if it lasts more than two weeks and his or her return will occur during the two week period prior to the end of the term.[21] Third, if an employee requests leave for a purpose other than his own serious health condition less than three weeks before the end of the term and the leave will last more than five working days, school officials may require a teacher to continue the leave until the end of the term.[22]

c. Reinstatement to an Equivalent Position

Restoration of an instructional employee to an equivalent position upon return from leave must be made "on the basis of 'established school board policies and practices, private school policies and practices, and collective bargaining agreements.'"[23] The policies used to determine an employee's restoration to an equivalent position must be in writing and must have been made known to the employee prior to taking FMLA leave.[24] Further, the policy must be substantially the same as the protections provided in the Act for reinstated employees.[25]

Sexual Harassment

Overview of Sexual Harassment

Title VII prohibits employers from discriminating with respect to "compensation, terms, conditions, or privileges of employment" on the basis of race, color, religion, sex or national origin.[26] In 1980, the Equal Employment Opportunity Commission (EEOC) promulgated regulations outlawing sexual harassment as a

form of unlawful discrimination.[27] Quid pro quo and hostile environment are the two types of sexual harassment prohibited by Title VII.

Quid pro quo harassment occurs when submission to unwelcome sexual advances, or requests for sexual favors, are made a term or condition of employment.[28] Hostile environment harassment takes place when unwelcome sexual advances or requests for sexual favors have the effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Lower federal courts recognized the existence of sexual harassment in the 1980s but it did not reach the Supreme Court until *Meritor Savings Bank v. Vinson*[29] in 1986. Drawing upon judicial decisions and EEOC guidelines, the Court found that Title VII affords people the right to work in an environment free from discriminatory intimidation, ridicule, and insult. As such, the Court held that hostile environment sexual harassment was actionable under Title VII as a form of sex discrimination.

An employee may establish a violation based on a hostile work environment by showing that discrimination based on sex created a hostile or abusive working environment. The harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[30] An employee may maintain a claim even though she did not resist the harassment or if she suffered no loss of tangible benefits. The inquiry is whether a plaintiff's conduct indicates that the sexual advances are unwelcomed, not whether her participation was voluntary.[31]

1. Hostile Environment

Five elements must be established to state a claim for sexual harassment. First, an employee must belong to a protected class. Since sex is a protected class, all that is required is the stipulation that a plaintiff is a woman. Second, an employee must prove that he or she was subjected to unwelcomed sexual harassment. The EEOC regulations define sexual harassment as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"[32] as the type of conduct that may constitute sexual harassment. Third, an employee must demonstrate that the harassment was based on sex. In order to prove the claim for hostile environment sexual harassment, a plaintiff must show that but for gender, he or she would not have been harassed. Fourth, the harassment must be sufficiently severe and pervasive to affect a term, condition, or privilege of employment. For example, the mere utterance of an offensive remark is not

enough to affect a term, condition or privilege of employment. Fifth, an employee must show that an employer knew or should have known of the harassment and failed to take any remedial action.

An objective-subjective standard, enunciated in *Harris v. Forklift Systems*,[33] is used to determine whether the environment is sufficiently severe and pervasive to create a hostile work environment. A party satisfies the objective standard when a reasonable person would find the environment to be hostile or abusive. A victim meets the subjective standard when he or she subjectively perceives the environment to be abusive and to have altered the conditions of employment.

Severe conduct does not have to cause an employee to suffer a nervous breakdown or seriously affect her psychological well-being. Whether an environment is hostile is decided by looking at the totality of the circumstances, including the frequency and severity of the alleged behavior.[34]

2. Quid Pro Quo

In order to establish a claim for quid pro quo sexual harassment, an employee must prove five elements similar to those of hostile environment. First, an employee must belong to a protected class. Second, an employee must have been subject to unwelcomed sexual harassment, this element differs from hostile environment because a supervisor must be the perpetrator of the harassment. Third, harassment must be based on an employee's sex. Fourth, an employee's reaction to the harassment must affect tangible aspects of the terms, conditions, or privileges of his or her employment. The acceptance or rejection of the harassment must be made an express or implied condition of employment or the receipt of job benefits; as such, a single incident may support a claim for quid pro quo sexual harassment. Fifth, an employee must establish employer liability.

3. Damages

A successful plaintiff is entitled to the remedies provided under the Civil Rights Acts of 1964 and 1991. Under the Civil Rights Act of 1964, a successful plaintiff is entitled to be made whole or to be put back in the same position that the employee would have been in but for the discrimination. Remedies include the pay and benefits lost due to discrimination, reinstatement, and reasonable attorney's fees. Following the passage of the Civil Rights Act of 1991, punitive and compensatory damages of up to $300,000 are available to victims of discrimination for malicious, intentional discrimination.

4. Section 1983 Claims

Section 1983 claims are often brought along with charges under the Civil Rights Act of 1964. In order to assert a section 1983 claim, a party must allege the "violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under the color of state law."[35] Section 1983 does not provide a person with a substantive right; rather, it offers a remedy for the deprivation of constitutional rights. Insofar as sexual harassment claims are cognizable under the Equal Protection Clause, they may be brought under section 1983. More specifically, a person may allege an equal protection claim when he or she "contends that he [or she] is receiving different treatment from that received by other individuals similarly situated."[36]

The factors that must be established to bring an equal protection claim based on sexual harassment have not been fully defined. Generally, a claim follows the requirements of a Title VII charge. A plaintiff must first present evidence of sexual harassment or discrimination. Then, unlike a Title VII claim, a plaintiff must prove an "intent" to harass based upon being a member of a particular class, not by her own personal characteristics. It is not necessary to prove that all women were sexually harassed. However, an accused harasser may raise a defense by attempting to show that the action was directed at a woman because of personal factors and not since she was a woman.

Sexual Harassment of Teachers

Sexual harassment is a major problem in the workplace.[37] Depending on which of the many studies are examined, thirty to seventy percent of women have experienced some form of harassment.[38] Since 1990, the number of harassment reports have increased 135 percent, from 6,127 in 1990 to 15,549 in 1995.[39]

While sexual harassment of students by peers or teachers receives national attention, sexual harassment of teachers by peers or supervisors is also a serious problem. Moreover, sexual harassment may go unreported if women teachers fear that filing complaints will result in the loss of their jobs. One reason harassment may be under-reported is that only eleven percent of school administrators are women and male supervisors may not be sympathetic to a female teacher's claim of sexual harassment.[40] Even so, sexual harassment claims in educational institutions are on the rise. For example, in 1992, sexual harassment claims from educational institutions accounted for 7.6 percent of all harassment claims reported to the EEOC.[41]

In order to maintain a claim under Title VII, a teacher must prove the elements for either quid pro quo or hostile environment sexual harassment. However, to hold a school district liable for the actions of one of its employees, a plaintiff must prove either that it did not provide a reasonable avenue for the teacher to complain or knew about the harassment and did not take any action to correct the situation. When claiming that the reporting of sexual harassment led to dismissal or transfer, a plaintiff does not have to establish that the discrimination was the sole factor behind a school's decision. Rather, a plantiff needs to demonstrate that the discrimination was a determining factor in the decision.

Same sex sexual harassment between two teachers, in at least one case, has not been found cognizable under Title VII.[42] However, change is in the offing in light of the Supreme Court's recent decision in *Oncale v. Sundower Offshore Services*.[43] In *Oncale* the Court ruled in favor of a male worker on an oil rig in holding that nothing in Title VII necessarily bars claim of sexual harassment discrimination where the plaintiff and defendant are of the same sex.

As illustrated by a brief review of relevant case law, proving a sexual harassment claim in a school setting can be difficult. For example, in *Locastro v. East Syracuse-Minoa Central School District*,[44] a teacher alleged that she was sexually harassed by her principal when, at a school dance, he asked her what she was doing after it was over as he placed his hand on her back and moved it down toward her buttocks in a sexually offensive manner. The principal also kissed her on the lips in a suggestive manner as students and other teachers were present. A few days later, the principal called the teacher into his office and explained the movie "Looking for Mr. Goodbar," where a special education teacher went to bars, picked up men, had sexual relations with them, and was murdered. On another occasion, the principal told the teacher to wear shorter skirts because he was a "leg man," and wanted to see more of her legs. While in the mail room, the principal put his hands on her back in an unwelcomed manner. Even though the teacher complained to her supervisor, the principal continued to harass her by standing outside her classroom and staring at her, and on other occasions, touching her. After an investigation, the superintendent did not take any action. A federal district court in New York dismissed the case not only because the teacher failed to make out a prima facie case of sexual harassment but also since it had legitimate reasons to terminate her employment in light of her documented tardiness, lying to school officials, and failing to obtain necessary certification.

In *Erlach v. New York City Board of Education*[45] a teacher claimed that she was harassed by a board employee who sent her on interviews at various schools. The

administrator allegedly called the teacher "*bubale*," a Yiddish term of endearment, blew on her fingers, held her hand, and asked her to bring him breakfast. The teacher further charged that her rejection of the defendant's advances resulted in her being sent to a dangerous public school. The court dismissed the suit in finding that since the sporadic and isolated remarks and actions occurred over a brief time period, the administrator had not created a hostile environment.

In *Howard v. Board of Education of Sycamore Community Unit School District No. 427*,[46] the chair of a music department claimed that after sexually offensive notes about her were posted, she complained to her principal and the executive director of business. When the chair also informed the junior high school principal about sexual comments made by a male teacher about female students, she was told not to do so any further. Subsequently, the chair heard a male teacher make sexually offensive comments about a female peer and endured offensive comments by male students. The harassment continued until the chair was constructively discharged. The chair filed complaints against the board and principal based on his comments and lack of action to correct the hostile environment. The suit also alleged that submission to the sexual harassment became an implied condition of her employment because of the failure to eliminate the hostile environment. The court found that these allegations were sufficient to survive the board's motion for summary judgment. The court held that, when read in their entirety, the allegations adequately apprised the board of the chair's claims and the factual bases underlying her suit.

The chair's section 1983 claim also survived as the court reasoned that the board violated her civil rights based on its widespread practice of ignoring sexual harassment in the schools. While there was no written policy authorizing such a practice, it was permanent and well settled so as to constitute a custom or usage with the force of law in the district. The court added that the chair stated a cause of action against the principal because he had an intentional hand in her being sexually harassed even though he did not do so personally. The court concluded that as principal, he was responsible to take action against sexual harassment in the school.

As reflected in *Charlton v. Paramus Board of Education*,[47] sexual harassment complaints can be intertwined with retaliatory discharge claims. Here a teacher alleged that she was dismissed for rebuffing the sexual advances of her supervisor and that school officials initiated proceedings to revoke her teaching certificate in retaliation for her Title VII sexual harassment and sex discrimination suit. The court held that a retaliation charge could be brought in federal court since she established that she engaged in conduct protected by filing her Title VII claim

and that the district took adverse action against her because she did so.

Trautvetter v. Quick[48] involved an elementary school teacher who brought a section 1983 claim against her principal for allegedly making romantic overtures. The teacher initially refused these advances but subsequently became involved in a sexual relationship. Yet, the teacher never told the principal that his conduct was inappropriate. In fact, a year after starting the relationship, the teacher met with the superintendent, who was aware of it, but did not claim that she was being harassed. It was only about two weeks later that the teacher complained to the superintendent about the principal's conduct. Following an investigation, the school board concluded that since the relationship was consensual, it did not constitute harassment. The Seventh Circuit affirmed that the teacher's section 1983 action was without merit since she did not raise a genuine issue of material fact that the principal's advances were a result of her status as a woman. If anything, the court observed that the principal's conduct was based on a personal attraction to the teacher.

The Rehabilitation Act and Americans With Disabilities Act

REHABILITATION ACT

1. Purpose

The Rehabilitation Act of 1973 was enacted to remedy discrimination against persons with disabilities by guaranteeing equal employment opportunities.[49] Subsequently, the Act was amended to try to make the government a model employer by ensuring equal employment opportunities and affirmative action requirements.

2. Scope

The Rehabilitation Act contains three separate provisions. The first requires most federal agencies to take affirmative actions to employ the disabled.[50] The second, Section 503 (a), applies only to federal contractors while providing for affirmative action.[51] Section 504, the third part, is the Act's general prohibition against employment discrimination relating to individuals with disabilities.[52] Consequently, since the Act applies to employers who receive federal financial assistance,[53] it implicates public schools.

3. Discrimination Prohibited by the Rehabilitation Act

Section 504 of the Rehabilitation Act states, in part that:

"[n]o otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the ben-

efits of, or be subjected to discrimination under any program or activity receiving federal financial assistance....[54]

The Act adopts a two-pronged approach to ascertain who is disabled. First, a person must either have a physical or mental impairment which substantially limits one or more of life's major activities, have a record of such an impairment, or be regarded as having such an impairment. Second, an individual must be "otherwise qualified" for the job.

4. Meaning of "Otherwise Qualified"

The meaning of the term "otherwise qualified" was addressed in *Southeastern Community College v. Davis*[55] wherein a woman who depended on lip-reading to communicate effectively with others claimed that she was discriminated against when she was denied admission into a nursing program based on her hearing impairment. The Supreme Court, in holding that the woman was ineligible for the program, reasoned that an otherwise qualified person is one who is able to meet all of a program's requirements in spite of her disability. Further, the Court ruled that an employer is not required to make substantial modifications to allow handicapped persons to participate.

In *Alexander v. Choate*,[56] the Supreme Court held that Section 504 was meant to strike a balance between the rights of the disabled and employers. According to the Court, while a grantee of federal funds may not be required to make fundamental or substantial modifications to accommodate persons with disabilities, an employer may be required to make reasonable accommodations.

Subsequent cases interpreting these two opinions have held that employers must make reasonable accommodations.[57] Other courts have concluded that there is a duty to make reasonable accommodations unless doing so would create an undue hardship for an employer.[58] Thus, a person is "otherwise qualified" if he or she would be able to perform the essential duties of the job with reasonable accommodations.[59]

5. Enforcement

The Rehabilitation Act is enforced through section 717 of the Civil Rights Act of 1964.[60] In order to establish a claim under the Rehabilitation Act, a party must prove that he or she is disabled; is otherwise qualified for the position; the discrimination is based solely on the disability; and, the program or activity receives federal funding.[61] Moreover, since virtually all schools receive some form of federal financial assistance, they are subject to the dictates of Section 504 and the Americans with Disabilities Act.

AMERICANS WITH DISABILITIES ACT

1. History and Purpose

The Americans with Disabilities Act (ADA) was signed into law by President George Bush on July 26, 1990.[62] Based on Congressional studies, the ADA was enacted because the Rehabilitation Act failed to achieve its goal of eliminating discrimination against persons with disabilities. The ADA requires public and private employers to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[63] Further, the ADA relies upon the federal government and the Fourteenth Amendment for enforcement to redress discrimination.[64]

2. Scope

The ADA is broader than the Rehabilitation Act, as employers from the private sector are covered to the same extent as under Title VII of the Civil Rights Act of 1964. A public or private employer is required to conform to the ADA if it has fifteen or more employees on the job for "each working day in each of twenty or more calendar weeks in the current or preceding year."[65]

3. Discrimination Under the ADA

The ADA prohibits an employer from discriminating against a "qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[66] While an employer may be liable under both the ADA and the Rehabilitation Act, the former opens up new liability through disparate impact discrimination which occurs when an employer uses a facially neutral selection criterion which has a disproportionate impact on the members of a sex, race, or religion, and the selection criteria are not job-related.

In order to be protected by the ADA, an employee must meet two thresholds. First, the employee must have a disability[67] as defined by the ADA. Second, the individual must be "otherwise qualified" to perform the job regardless of whether a reasonable accommodation is made.[68] The ADA neither establishes quotas nor affirmatively requires the disabled to be hired.

4. Disability

The term "disability" is taken directly from the Rehabilitation Act. A person is disabled if he or she has a "physical or mental impairment that substantially limits one or more of the major life activities,"[69] has a "record of such an impairment,"[70] or is "regarded as having such an impairment."[71] Federal regulations list of mental or physical impairments, including contagious and non-contagious diseases,[72] that qualify as disabilities under the ADA.[73] The regulations define "major life activities" as the ability to care for oneself and to perform such tasks as walking, seeing, hearing, speaking, breathing, learning, and working.[74] Homosexuals,[75] transvestites,[76] compulsive gamblers,[77] and individuals who have disorders occurring from illegal drug use[78] are excluded from the definition of disability.

5. Qualified Individual

In order to be protected by the ADA, an individual with a disability must not only be qualified but must also be able to perform the essential functions of the position with or without reasonable accommodations.[79] The refusal to hire an individual based on the inability to perform peripheral job functions is illegal. Written job descriptions prepared prior to advertising an available position may be evidence of the essential functions of the job.[80] While not conclusive, courts give great weight to these descriptions. The burden of proof is on an employer to demonstrate that a disability renders an individual incapable of performing essential job duties.

The ADA requires employers to provide reasonable accommodations when determining whether an individual with a disability is qualified for a job.[81] Reasonable accommodations include making facilities accessible, restructuring work schedules, modifying equipment and devices, and hiring readers or interpreters.[82] The ADA does not require employers to make all possible, or the best, accommodations. It is sufficient if accommodations meet the needs of a person with a disability.

The ADA limits requirements for medical examinations. During the interview stage, an employer may ask an applicant if he or she has the ability to perform the essential job functions.[83] However, an employer is prohibited from requiring an applicant to undergo a medical examination until after a job offer is extended.[84] A medical examination is only allowed where the general policy is to require a medical examination of all new hires. Medical records must be kept confidential and used only for the purposes allowed under the Act.[85]

6. Defenses

a. The Employment Criteria Are Job Related and a Business Necessity

An employer may conduct a study, analyzing each position to determine the essential functions of a job. After such a review, an employer may devise qualification standards, tests, or other selection criteria necessary to perform the job.[86] If this analysis is accurate and fair, an employer may rely on these standards when making employment decisions, even if disabled persons are adversely affected.

b. Direct Threat to Health or Safety

If an individual poses a direct threat to the health or safety of other employees at the workplace, an employer may lawfully refuse to hire a disabled person. The ADA defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[87] Determining whether a "direct threat" exists should be made on a case by case basis in light of a reasonable assessment of current medical evidence to determine the nature, duration, and severity of the risk as well as the probability that the potential risk will occur, and whether reasonable modifications of policies, practices, or procedures can mitigate the risk.

c. Undue Hardship of Reasonable Accommodation

A third possible defense is that requiring a reasonable accommodation would impose an undue hardship on an employer. Factors that can be considered in determining whether a hardship is undue are the nature and cost of the accommodation; a facility's financial resources; the number of persons working at the facility and by the employer in general; and, the impact that the accommodation would have on the operation of the facility.[88]

7. Enforcement and Remedies

The ADA incorporates the enforcement procedures of Title VII.[89] A person who has been discriminated against must first file a timely claim with the EEOC. After receiving a right to sue letter from the EEOC, an individual may file suit in state or federal court. Title V of the ADA allows a prevailing party to recover attorney's fees, prohibits retaliation against those who exercise their rights under the ADA, authorizes states to establish higher standards for protecting the disabled, and abrogates state immunity from damages under the ADA.[90]

Cases Involving Teachers

Insofar as public schools have been subject to Section 504, the ADA is likely to have a greater impact in the private sector. Even so, the ADA impacts on public schools. Although the two laws are similar, since public schools are generally subject to the Rehabilitation Act and the ADA, they have to meet the requirements of both. School districts will now have to make both reasonable accommodations for disabled persons and modifications to the nonessential requirements of each job. Identifying essential functions when preparing job descriptions becomes more important because this is a major factor in determining liability and whether there have been reasonable accommodations. Districts cannot make medical inquiries or require medical examinations prior to an offer of employment.

Any review of relevant, and illustrative, case law in this area must begin with *School Board of Nassau County, Florida v. Arline*.[91] In *Arline*, a landmark decision involving Section 504, the plaintiff was an elementary school teacher who filed suit under Section 504 when she lost her job after her third relapse of tuberculosis in two years.

A trial court ruled that the teacher was not covered by the Act but the Eleventh Circuit reversed in her favor. On appeal, the Supreme Court affirmed that the teacher's hospitalization was sufficient to establish a record of impairment and classified her as disabled. Consequently, the Court remanded for a determination of whether she was, in fact, otherwise qualified to be a teacher. The Court reasoned that allowing discrimination based on a contagious disease was inconsistent with the purpose of the Rehabilitation Act, which was to ensure persons with disabilities are not discriminated against because of the prejudices or ignorance of others. It added that having a contagious disease does not remove a person from coverage of the Rehabilitation Act.

As part of its ruling, the Court also addressed whether *Arline* was "otherwise qualified." In stating that an individualized inquiry must be conducted to answer this question, the Court wrote that it should include the nature, duration, and severity of the risk along with a consideration of whether the disease can be transmitted and cause varying degrees of harm. It added that courts should defer to reasonable medical judgments in answering these questions.

The Court concluded by finding that a person who suffers from a contagious disease can be disabled within the meaning of the Rehabilitation Act. Following the passage of the ADA, this is no longer an issue; contagious diseases are included within the statute as disabilities.

A year after *Arline*, in *Chalk v. United States District Court Central District of*

California,[92] the Ninth Circuit rendered an important decision. In 1987, a teacher of hearing-impaired students was hospitalized and diagnosed with AIDS. After eight weeks of treatment, the teacher was found fit for duty, but his district placed him on administrative leave pending the opinion of the local Director of Epidemiology and Disease Control. Even though the Director informed district officials that the teacher would not place students or other personnel at risk, he filed suit under Section 504 when he rejected its offer of an administrative position since it would have prevented him from returning to the classroom.

The court applied *Arline* to the facts and reasoned that available studies disclosed that there was no risk of transmitting AIDS through close non-sexual contact with an infected person. The court pointed out that Section 504 permits an employee's exclusion only if there is a significant risk of communicating an infectious disease to others and that *Arline* requires employers to defer to reasonable medical judgments. As such, the Ninth Circuit held that the trial court erred by rejecting the overwhelming medical evidence in support of the teacher.

After concluding that the teacher suffered an irreparable injury, the court looked at the balance of hardships. The district claimed that it would have been harmed by the risk to others posed by the teacher's return to the classroom. While recognizing that the public interest is a traditional criteria to be considered when deciding whether to grant injunctive relief, the court found that there was no evidence of any risk to the children or school personnel. The court remanded with orders to grant a preliminary injunction and to set reasonable procedures to deal with the circumstances that might have arisen when the teacher's condition deteriorated.

Even though the ADA was passed in 1990, teachers have continued to bring suit under the Rehabilitation Act. The following cases are illustrative of the litigation in this area.

In *Borkowski v. Valley Central School District*,[93] a teacher brought suit solely on the basis of Section 504. The teacher, who suffered major head trauma and serious neurological damage as a result of a car accident, had continuing trouble with memory and concentration as well as dealing with multiple stimuli. Following her accident, the teacher applied for a job with the district, informed officials of her condition, and was hired as a probationary library instructor for two elementary schools. When her term expired, she was not granted tenure. The superintendent claimed that the teacher had poor classroom management and had difficulty controlling her class.

The teacher conceded that her performance was inadequate but claimed that with the reasonable accommodation of an aide, she would have been able to per-

form all of her duties. The Second Circuit agreed that the proposed accommodation fell within the range of reasonable accommodations since the Rehabilitation Act allows for the possibility of using assistants. As such, the court decided that the teacher met the burden of establishing the reasonableness of her proposed accommodation and that the school did not present evidence to support its claim that her request was unreasonable.

The court also considered whether the teacher was denied tenure solely on the basis of her disability. The court held that since the school was aware of her disabilities when it hired the teacher, it had an affirmative obligation to make reasonable accommodations. The Second Circuit concluded that the district's failure to make reasonable accommodations resulted in performance inadequacies due to her disability.

Byrne v. Board of Education, School of West Allis-West Milwaukee[94] dealt with whether a teacher who was allergic to fungus was disabled within the meaning of the Rehabilitation Act. In 1983, the teacher began having respiratory difficulties which worsened during the week but improved on the weekends. The teacher's doctor believed that the classroom was the source of her problem, which he reported to the principal. The district proceeded to inspect and clean the heating and ventilation system, added new filters, tested the temperature, analyzed the dust, removed the fiberglass drapes, and installed a humidifier. After being hospitalized, the teacher discovered that she was allergic to a common fungus found in many environments, and that continued exposure could lead to permanent lung disease. Based on the advice of the teacher's physician, she was transferred. After several leaves totaling two and a half years, the teacher filed suit under Section 504 when the board terminated her employment.

A federal trial court entered a judgment on a jury verdict in favor of the board and the Seventh Circuit affirmed. The court ruled that insofar as there were questions of fact for the jury over whether the teacher's sensitivity to fungus was a substantial limitation of a major life activity, whether she had a record of impairment, and whether she was regarded as having an impairment by the board, there was no compelling reason why it should over-rule the findings of the trier of fact.

In *Johnson v. Chattanooga Board of Education*,[95] a teacher was diagnosed as suffering from illnesses which restricted her ability to remain on her feet for long periods of time. The teacher took disability leave after a transfer from one elementary school to another. The Sixth Circuit affirmed the dismissal of the teacher's claim on the ground that she was not suffering from a legally cognizable injury under the Rehabilitation Act.

In *Pandazides v. Virginia Board of Education*,[96] a teacher filed suit against the state board under Section 504 alleging that she was improperly deemed ineligible to teach because she could not achieve an acceptable score on the National Teachers Examination (NTE) due to her learning disability. The Fourth Circuit remanded for a determination of whether the NTE represented essential functions of the job, if the teacher could perform the essential job functions, and if a waiver of the test would have been a reasonable accommodation.

Finally, *Pendleton v. Jefferson Local School District Board of Education*[97] involved a mathematics teacher who was suffering from multiple sclerosis. The teacher claimed that her principal harassed her until she was forced to retire. The teacher's doctor advised the principal that she was still physically, mentally, and emotionally capable of performing her position. Subsequently, the teacher broke her leg and could not finish the year. The principal harassed her, calling her frequently to ask when she was returning. The teacher, in light of the ongoing harassment by the principal, followed her doctor's recommendation that she apply for disability. In allowing the suit to proceed, the Sixth Circuit held that section 504 permits cases involving discrimination against the disabled to be brought not only where a person's employment is terminated, but also where someone is excluded from a job or is constructively discharged due to discrimination due to his or her disability.

Conclusion

This chapter's overview of these important areas of the rights of employees to be free from discrimination demonstrates the necessity of timely and astute compliance. The FMLA is capable of full effectuation by responsible school administrators since its language and regulations are straightforward.

Federal, state, and local laws prohibiting sexual harassment effectively compel continuing internal training of school business officials and other educational personnel, to insure that all obey the law and refrain from unlawful conduct. As the case law demonstrates, unlawful acts result in significant liability.

Section 504 and the ADA poses the most complex initial determinations in order to ensure compliance. As such, responsible administrative personnel should work closely with employment counsel to implement the disabilities laws.

Notes

1 Fifty-six percent of women with children under the age of six are in the workforce, while fifty-one percent of women with children under the age of one are employed. Overall, ninety-six percent of fathers and sixty-five percent of mothers are employed. A. S. Miles, C. J. Russo, and A. W. Steinhelber, "The Family and Medical Leave Act of 1993: An Overview and Implications for Schools," 88 *Educ. L. Rep.* 923, (1994).

2 *See* 29 U.S.CA. § 2601.1. 29 U.S.C.A § 2601(b) (1) (West 1997).

3 29 U.S.C.A. § 2601 (b) (1) (West 1997).

4 *Id.*

5 29 U.S.C.A. § 2611 (4) (A) (I). For determining if an employer is covered under the act, both full time and part time workers are counted toward the 50 person threshold. *See* 29 C.F.R 825.105 (c). Not counted are employees who have been laid off, and those who are on permanent disability. Separate entities may be treated as one employer for determining employment, if they meet the "integrated employer" test. *Id.*

6 29 U.S.C.A. § 2611 (4) (A) (ii) (I) (II) and (iii). A public agency is considered to be a person engaged in commerce or in an industry that affects commerce. 29 U.S.C.A. § 2611 (4) (B).

7 *See* 29 U.S.C.A. § 2611 (2) (A) (ii).

8 29 U.S.C.A. § 2612 (1) (A) (B) (C) (D).

9 29 C.F.R. § 825.114. Treatment does not include routine physical examinations, eye examinations, and dental examinations. 29 C.F.R. § 825.114 (b). Cosmetic treatments are also not included as a serious health condition. 29 C.F.R. § 825.114 (c). Substance abuse may be a serious health condition if certain conditions are met. The employee must be taken for treatment for substance abuse by a health care provider. Absence because of substance use does not qualify for FMLA leave. 29 C.F.R. § 825.114 (d).

10 *See* 29 U.S.C.A. § 2614 (a) (I) (A) (B).

11 *See* 29 U.S.C.A. § 2614 (b) (2).

12 29 C.F.R. § 825.600 (c).

13 Teacher's assistants are defined as those whose primary job is not actual teaching or instructing. Counselors, psychologists, and curriculum specialists are considered auxiliary personnel. *Id.*

14 *See* 29 C.F.R. § 825.601 (a).

15 *See* 29 C.F.R. § 825.601 (a) (I).

16 *See* 29 C.F.R. § 825.601 (a) (1) (i) and (ii). "Period of a particular duration" means "a block... of time beginning no earlier than the first day for which leave is needed and end-

ing no later than the last day on which leave is needed, and may include one uninterrupted period of leave." 29 C.F.R. § 825.601 (a) (2). Not all leave taken during a "period of particular duration" is counted against leave entitlement under the FMLA. If a teacher takes leave for a "period of particular duration" in intermittent or reduced leave, the Act counts the entire period of leave as FMLA leave. 29 C.F.R. § 825.603 (a). If a school uses the special rules that require a teacher to take leave until the end of the term, the FMLA leave entitlement is counted against the teacher until he or she is ready and able to return to work. 29 C.F.R § 825.603 (b).

17 *See* 29 C.F.R. § 825.601 (a) (I) (ii).

18 *See* 29 C.F.R. § 825.601 (b).

19 *See* 29 C.F.R. § 825.602. The statute defines "academic term" as a school semester, using the term "end of semester" to mean the end of the spring semester. The statute specifies that the school may not have more than two semesters for each year for purposes of the FMLA. 29 C.F.R § 825.602 (b).

20 *See* 29 C.F.R. § 825.602 (a) (I) (i), (ii).

21 29 C.F.R. § 825.602 (a) (2) (i), (ii).

22 *See* 29 C.F.R. § 825.602 (a) (3).

23 29 C.F.R. § 825.604.

24 *See* 29 C.F.R. 825.604.

25 *See* 29 C.F.R. § 825.604. A policy must restore a teacher to an equivalent position, with equivalent employment benefits, pay, and other terms and conditions of employment. The teacher may not be reinstated to a job requiring additional licensure or certification.

26 42 U.S.C. § 2000-e (2) (a) (I). The purpose of the act was to remove arbitrary barriers to equality in employment. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

27 *See* 29 C.F.R. § 160.11 (setting out EEOC guidelines for sexual discrimination).

28 EEOC guidelines state that "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment." 29 C.F.R. § 1604.11 (a).

29 477 U.S. 65 (1986).

30 *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 879 at 904 (11th Cir. 1982).

31 29 C.F.R. § 1604.11 (a).

32 *See Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982).

33 510 U.S. 17 (1993).

34 *See* 29 C.F.R. § 1604.11 (b) (stating that to determine whether conduct constitutes sexual harassment, courts should look at record as a whole and at totality of circumstances).

35 *See Trautvetter v. Quick*, 916 F.2d 1140, 1148 (7th Cir. 1990) (citing West v. Atkins, 487 U.S. 42, 48 (1988).

36 *Gobla v. Crestwood Scl. Dist.*, 609 F. Supp at 978 (1985), (citing Skadegaard v. Farrell, 578 F. Supp. 1209, 1215 (D.N.J. 1984)).

37 In 1987, over forty percent of female employees reported incidents of sexual harassment. *See Ellison v. Brady*, 924 F.2d 872 at 881 (9th Cir. 1991). Between May 1985 and May 1987, sexual harassment cost the federal government $267 million for losses in productivity, sick leave, and employee replacement costs. *Id.*

38 *See* S. Richardson, "Sexual Harassment Cases Reflect Growing Awareness," *Pantagraph* at A12, (April 14, 1996).

39 *See* M. Warner, "Sexual Harassment: More Cases Since Thomas Hearing," *Sunday Patriot News*, J1, (August 25, 1999) (citing similar statistics and stating that Thomas hearings instigated that increase). About thirty percent of cases reported in 1994 were unfounded. *See* Richardson, *id.* A12, (August 25, 1996). Approximately twenty-three percent of the cases are resolved in favor of the victim.

40 *See* M. Stanley, "Teachers Reflect on Sexual Harassment," *Wash. Times*, at A13, (Mar. 5, 1995).

41 *Id.*

42 *See Benekritis v. Johnson*, 882 F. Supp. 521 (D.S.C. 1995).

43 523 U.S. 75 (1998).

44 830 F. Supp. 1333 (N.D.N.Y. 1983).

45 Civ. No. 94-4239, 1996 WL 705282, at *5 (E.D.N.Y. 1996).

46 876 F. Supp. 959 (N.D. Ill. 1995).

47 25 F.3d 194 (3rd Cir. 1993).

48 *See Trautvetter v. Quick*, 916 F.2d 1140 (7th Cir. 1990).

49 *See* 29 U.S.C.A. § 701.

50 29 U.S.C.A. § 791 (b).

51 This requires federal contractors and its subcontractors to "take affirmative action to employ and advance in employment qualified individuals with handicaps" in conjunction with any federal contract or subcontract performance "for the procurement of personal property and nonpersonal services (including construction)" greater than $2,500. See 29 U.S.C.A. § 793 (a).

52 *See* U.S.C.A. § 794 (a).

53 *See* U.S.C.A. § 794 (a). "Federal assistance" is defined as "any grant, loan contract...or any other arrangement by which the Department provides or otherwise makes available in the

form of: 1) Funds; 2) Services of Federal Personnel; 3) Real and personal property or any interest in or use of such property, including: (i) Transfers or leases of such property for less than fair market value or for reduced consideration; and (ii) Proceeds from a subsequent transfer or lease of such property if the Federal Share of its fair market value is not returned to the Federal Government. 45 C.F.R. § 843.3 (h).

54 *See* 29 U.S.C.A. § 794 (a)

55 442 U.S. 397 (1979).

56 469 U.S. 287 (1985).

57 Reasonable accommodations may be making facilities used by employees readily accessible to and usable by persons with disabilities, job restructuring, part time or modified work schedules, acquisition or modification or equipment or devices, the provision of readers or interpreters, and other similar actions. 45 C.F.R. § 84.12 (b).

58 The regulations posit three factors to be considered to determine if an accommodation would impose an undue hardship:

(1) the overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) the type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) the nature and cost of the accommodation needed.

5 C.F.R. § 84.12 (c) (1) (2) (3).

59 *See* 45 C.F.R. 84.3 (k) (defining "qualified handicapped person"); 45 C.F.R. pt. 84, at 346.

60 *See* 29 U.S.C.A. § 794 a (a) (1). In its discretion, a court may also award attorney's fees. *See* 29 U.S.C.A. § 794 a (b).

61 *See Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981).

62 *See* L. M. Schumaker, "The Americans with Disabilities Act of 1990," 47 *J. Mo. B.* 542, (1991).

63 *See* 29 U.S.C.A. § 12101 (b).

64 *See* 42 U.S.C.A. § 12101 (b); see also R. D. Wenkart, *The Americans with Disabilities Act and Its Impact on Public Education*, 82 Ed. L. Rep. 291, 292 (1993).

65 *See* 42 U.S.C.A. § 12111 (5). Although passed in 1990, the ADA did not take effect until 1992. In 1992, only those with at least 25 employees were subject to the statute, with the 15 person requirement taking effect in 1994. Only certain provisions for public entities became effective on January 26, 1992. See J. Higginbotham, "The Americans with Disabilities Act," 12 *Hamline J. Pub. L. & Pol'y* 217, 217, (1991).

66 *See* 42 U.S.C.A. § 12112 (a). Construction of the word discrimination is set forth in 42 U.S.C.A. § 12112 (b).

67 *See* 42 U.S.C.A. § 12102 (2) (defining disability as "A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; B) a record of such an impairment; or C) being regarded as having such an impairment").

68 *See* 42 U.S.C.A. § 1211 (8) (defining qualified individual with a disability as one "who with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"). In determining the essential functions, an employer's judgement is given consideration as to what functions are essential, and to written description of the job.

69 42 U.S.C.A. § 12101 (2) (a).

70 42 U.S.C.A. § 12101 (2) (b). The regulations explain the phrase having a record of an impairment to mean that an individual has a history or has been incorrectly diagnosed as having an impairment that limits one or more major life functions. See also 28 C.F.R. § 35.104 (4) (3).

71 U.S.C.A. § 12101 (2) (c). This prong of the definition is met when others perceive an individual as having a disability when in fact he or she does not, or treated as having an impairment by a public entity. See also 28 C.F.R. § 35.104 (4) (4).

72. *See* 28 C.F.R. § 35.104 (1) (II). This was codified from *Arline*. See *Arline*, 480 U.S. 273 (1986).

73 Physical impairment includes any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of the following body systems: Neurological musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine. 28 C.F.R. § 34.104 (1) (i) (A). Mental disorders include "mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 28 C.F.R. § 34.104 (1) (i) (B).

74 *See* 28 C.F.R. § 35.104 (2).

75 *See* 42 U.S.C.A. § 12211 (a); this also excludes bisexuals.

76 *See* 42 U.S.C.A. § 12208; see also 42 U.S.C.A. § 12211 (b) (1) (excluding transsexualism, pedophilia, voyeurism, gender identity disorders, and other sexual behavior disorders from definition of disability).

77 *See* 42 U.S.C.A. § 12211 (b) (2).

78 *See* 42 U.S.C.A. § 12211 (b) (3). The ADA seems to protect recovering alcoholics and drug addicts as long as they are not current users of illegal drugs.

79 42 U.S.C.A. § 12111 (8). A potential employee must first meet the prerequisites of the position, such as education, or experience.

80 *See* 42 U.S.C.A. § 12111 (8).

81 *See* 34 C.F.R. § 104.12.

82 *See* 42 U.S.C.A. § 12111 (9); 34 C.F.R. § 104.12 (b).

83 *See* 42 U.S.C.A. § 12112 (d) (2) (B).

84 *See* 42 U.S.C.A. § 12112 (d) (3).

85 *See* 42 U.S.C.A. § 12112 (d) (3).

86 *See* 42 U.S.C.A. § 12113 (a).

87 *See* 42 U.S.C.A. § 12111 (3).

88 *See* 42 U.S.C.A. § 12111 (10) (B).

89 *See* 42 U.S.C.A. § 12117 (a) (stating that "the powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9 of this title" are applicable to violation of ADA).

90 *See* 42 U.S.C.A. § 12202 (indicating that the state is not immune from action for violation of this chapter).

91 480 U.S. 273 (1987).

92 840 F.2d 701 (9th Cir. 1987).

93 63 F.3d 131 (2nd Cir. 1995).

94 979 F.2d 560 (7th Cir. 1992).

95 927 F.2d 604 (6th Cir. 1991) (unpublished disposition).

96 946 F.2d 345 (4th Cir. 1991).

97 958 F.2d 372 (6th Cir. 1992) (unpublished disposition).

CONSTITUTIONAL **ISSUES**

Services For Students With Disabilities

—

Religious Influences & the Public School

—

Student Free Speech & Dress Codes

—

The Fourth Amendment & the Quest for Drug & Weapon Free Schools

CHAPTER TEN

Services for Students With Disabilities

■ by Allan G. Osborne, Jr.

In 1975 Congress passed landmark legislation designed to provide the nation's disabled student population with unprecedented access to educational services. Originally named the Education for All Handicapped Children Act, that legislation is now known by its revised title, the Individuals with Disabilities Education Act (IDEA).[1] The statute called for school districts to provide students with disabilities with free appropriate public educations in the least restrictive environments. The law also provided disabled students, and their parents, with due process rights, including the right to contest decisions made by school districts over the delivery of a free appropriate public education in the least restrictive environment. Consequently, since the enactment of the IDEA, literally thousands of lawsuits have been filed challenging the actions of school districts.

The IDEA is not the only law governing special education. Section 504 of the Rehabilitation Act[2] and the Americans with Disabi[1]:ties Act (ADA)[3] offer additional protections for students with disabilities. Section 504 prohibits programs that receive federal funds from discriminating against individuals with disabilities. Further, the ADA expands section 504's discrimination prohibition to the private sector and includes provisions applicable to public entities. In addition, all states currently have laws governing the provision of special education. However, a discussion of state statutes is beyond the scope of this chapter.

It is impossible in this brief chapter to cover the myriad provisions of the IDEA, section 504, and the ADA. Thus, only the major substantive provisions of these laws are discussed.[4] Accordingly, the many procedural provisions of the statutes are mentioned only to the extent necessary for a clear understanding of the substantive issues.

Appropriate Placement

Although the IDEA requires school districts to provide students with disabilities with free appropriate public educations, it provides little guidance in terms of what would be considered appropriate. The IDEA's regulations indicate that an appropriate education consists of special education and related services provided in conformance with an Individualized Education Program (IEP).[5] Yet, a precise definition of the term appropriate cannot be found in either the statute itself or its implementing regulations. As such, it is necessary to turn to court decisions for further guidance as to what constitutes an appropriate education.

"Appropriate" Defined

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*,[6] the United States Supreme Court provided a minimal definition of an appropriate education. *Rowley* arose when the parents of a kindergarten student who was hearing impaired protested the school district's refusal to provide the child with a sign-language interpreter. Lower courts had ordered the district to provide the requested interpreter on the basis that an appropriate education was one that allowed a student with a disability to achieve at a level commensurate with that of her nondisabled peers. The Supreme Court, in finding that the student was achieving passing marks and advancing from grade to grade without the sign-language interpreter, reversed. The Court held that an appropriate education was one that was formulated in accordance with all of the IDEA's procedures and was designed to provide the student with some educational benefit. Since the student in *Rowley* was receiving some educational benefit without the sign-language interpreter, the Court ruled that the district was not required to provide one, even though the child might have achieved at a higher level with those services.

Rowley establishes a minimum standard for what constitutes an appropriate education. However, individual states may set higher standards. For example, courts in North Carolina,[7] New Jersey,[8] Massachusetts,[9] Michigan,[10] and California[11] have held that those states have higher standards of appropriateness. In some of these decisions the courts also specifically ruled that the higher state standard replaces the federal requirements since one of the essential elements of the IDEA is that special education programs must meet "the standards of the state educational agency."[12] In fact, many of these states have statutes that require districts to provide programs to maximize the potential of students with disabilities commensurate with the educational opportunities provided to their peers who are not disabled.

In recent years the *Rowley* standard has been further refined. Courts have indicated that the some educational benefit criteria require more than just minimal or trivial benefits.[13] Other courts have expanded the criteria by stating that the educational benefit must be meaningful[14] or appreciable.[15] One court went so far as to maintain that the gains made by a student must be measurable to meet the *Rowley* criteria.[16]

Least Restrictive Environment

The IDEA states that a student with disabilities must be educated in the least restrictive environment.[17] In recent years this provision has generated a fair amount of controversy due to the inclusion movement. Inclusion is a philosophy whereby students with disabilities are educated in general education classrooms alongside their peers who are not disabled.

In two high profile cases, federal appellate courts in New Jersey and California ordered school districts to place students with moderate to severe disabilities in regular educational settings as opposed to segregated special education classrooms.[18] In these and other decisions, courts have held that there are several factors that school districts must consider when determining the least restrictive environment for a given student. As summarized by the Ninth Circuit, the four factors that educators must consider in making a placement are the educational benefits of placing a child with a disability in a regular classroom; the nonacademic benefits of such a placement; the effect that the student's presence would have on the teacher and other children in the class; and the costs of an inclusionary placement.[19] Inherent in these decisions is the principle that school systems must make all reasonable efforts to place students with disabilities in mainstream settings by providing them with supplementary aids and services to ensure success.

The focus on inclusion notwithstanding, this does not mean that all students with disabilities must be placed in regular education classes. Recently, courts have approved segregated settings where districts were able to show that students could not function in a regular education classroom or would not benefit from placement in such a setting, even with supplementary aids and services.[20] The bottom line is that an inclusionary placement should be the placement of choice. A segregated setting should be contemplated only if an inclusionary placement has failed in spite of the school system's best efforts or there is overwhelming evidence that it is not feasible.

Private and Residential School Placements

In spite of the IDEA's preference for placing students in the mainstream, such a setting is not feasible for all students. Thus, the IDEA requires school districts to offer a continuum of placement alternatives to meet the special education needs of students with disabilities.[21]

A private school placement may be required when a district simply does not have an appropriate placement available. This may occur when a student has a low incidence disability and there are not enough children with the same type of disability within the district to warrant the development of a program.[22] Courts have consistently recognized that since smaller school systems cannot afford to develop specialized programs for small numbers of students, they must look elsewhere for placements.

Courts may order residential placements when it can be shown that a student's disabilities require twenty-four hour per day programming or consistency between the school and home environments. Generally, students in this situation have severe, profound, or multiple disabilities.[23] Residential placements may also be necessary for students with significant behavioral disorders[24] or those who require total immersion in an educational environment in order to progress.[25]

If a residential placement is required for purely educational reasons, the costs of such a setting must be fully borne by a school district. Moreover, a district cannot require parents to contribute toward the cost of a residential placement.[26] However, if a placement is made for other than educational reasons, for example, for medical or social purposes, then a school district is only required to pay for the educational component of the residential setting.[27] In these instances a district may enter into a cost-share agreement with other agencies. At the same time, there is a caveat: one court held that a school district was responsible for all costs associated with a residential placement when the student's educational, medical, social, and emotional needs were so intimately intertwined that they could not be treated separately.[28]

Extended School Year Programs

If a student with a disability requires an educational program that extends beyond the traditional school year, it must be provided. In several early decisions appellate courts held that extended school year programs must be an available option and that a district's refusal to consider one violated the IDEA.[29] An extended school year program is generally required when a stu-

dent's regression and the time it takes to recoup lost skills interferes with overall progress toward the attainment of the goals and objectives of the student's IEP.[30] The regression that a student suffers must be greater than the regression that normally occurs during a school vacation. If the regression is minimal, an extended school year program is not required.[31]

Related Services

Under the IDEA school districts must provide related, or supportive, services to students with disabilities if they are necessary to assist the students in benefitting from their special education programs.[32] The IDEA specifically lists developmental, supportive, or corrective services such as transportation, speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation), social work services, counseling services (including rehabilitation counseling), medical services (for diagnostic or evaluative purposes only), and early identification and assessment as related services.[33]

The only limitation placed on what could be a related service is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes. The list of related services is not exhaustive but could include other services that may be required to assist a student with disabilities to benefit from special education.[34] Thus, artistic and cultural programs of art, music, and dance therapy could be related services. Related services may be provided by persons of varying professional backgrounds with an array of occupational titles.

Related services must be provided only to students who are receiving special education services. Under the IDEA's definitions, a child is disabled only if he or she requires special education. Since related services are to be provided when necessary for a child to benefit from special education, a school system is not required to provide related services when the child is not receiving special education.

One of the most controversial topics under the rubric of related services involves the distinction between medical and school health services. In 1984 the Supreme Court held that a service such as catheterization that can be performed by a school nurse or trained layperson is a required related service under the IDEA.[35] Obviously, any procedures that must, by law, be performed by a licensed physician would be exempted medical services. Consequently, psychiatric therapy would not be a related service since a psychiatrist is a licensed physician. Many students with significant medical needs require round-the-

clock nursing services. This type of service falls somewhere on the continuum between school health services and medical services. The Supreme Court decided to put an end to the controversy in 1999 when it held that a school district was required to provide full-time nursing services for a student who was a quadriplegic as a result of a motorcycle accident. The Court stated that continuous nursing services may be more costly, but that does not make them more medical so that they do not fall within the medical services exemption.[36]

Another potentially costly related service is assistive technology devices or services. In 1990 the IDEA was amended to add definitions of assistive technology devices and services. An assistive technology device is any item or piece of equipment that is used to increase, maintain, or improve the functional capabilities of individuals with disabilities.[37] These devices may include commercially available, modified, or customized equipment. An assistive technology service is designed to assist an individual in the selection, acquisition, or use of an assistive technology device. The IDEA includes an evaluation of the individual's needs, provision of the assistive technology device, training in its use, coordination of other services with assistive technology, and maintenance and repair of the device.[38] These services will be required when it is necessary for a child to receive an appropriate education under the *Rowley* standard. They may also allow many students with disabilities to benefit from education in less restrictive settings.

Remedies

When a school district fails to provide a student with disabilities with the free appropriate public education called for by the IDEA, the statute authorizes the courts to grant appropriate relief.[39] Frequently, the relief orders a school district to provide certain specified special education and related services. However, in circumstances where the parents have unilaterally obtained the necessary services at their own expense, the courts may order a district to reimburse the parents for all legitimate expenses.

Damages

Lawsuits for educational malpractice in special education have not generally been successful. In the past, the courts generally have not imposed punitive damages on school authorities for failing to provide free appropriate public

educations to students with disabilities.[40] Similarly, general damages awards for "pain and suffering" have not been prevalent.[41] Yet, recent litigation indicates that this may be changing. In several lawsuits courts have indicated that monetary damages may be available under other statutes, such as section 504, if the parents can show that school officials intentionally discriminated against the student or egregiously disregarded the student's rights.[42] The operative word here is *intentional*. If school officials act in good faith but their efforts fall short of the statutory requirements, they should be immune from damages.

Tuition Reimbursement

Sometimes parents who are dissatisfied with a district's educational placement unilaterally enroll their child with a disability in a private school and subsequently seek to recover tuition expenses. The Supreme Court has held that parents are entitled to tuition reimbursement if they succeed in showing that a school district failed to offer an appropriate placement and that their chosen placement is appropriate.[43] The Court reasoned that awarding reimbursement simply requires a school district to pay retroactively the costs it should have been paying all along. In a later decision, the Court ruled that parents are also entitled to tuition reimbursement even if their chosen placement is not in a state approved facility as long as it provided an otherwise appropriate education.[44] Even so, when parents make unilateral placements, they do so at their own financial risk because they are not entitled to reimbursement if a school district can show that it offered, and could provide, an appropriate educational placement.

Parents are also entitled to reimbursement for unilaterally obtained related services if they can demonstrate that a school district failed to provide the needed services. For example, courts have frequently ordered districts to reimburse parents for the costs of counseling or psychotherapy after the parents succeeded in showing that these services were necessary in order for their children to benefit from special education.[45]

Compensatory Services

An award of tuition reimbursement is of little use to parents who are unable to make a unilateral placement in a private school because they cannot afford to pay the tuition costs up front. When parents cannot afford to take the financial

risk of making a unilateral placement, their child may well remain in inappropriate placements for some time while the dispute winds its way through administrative due process hearings and judicial proceedings. In a situation such as this, a court may award additional educational services along with prospective relief to compensate the parents, and child, for the loss of appropriate educational services. Compensatory services would be provided during a time period when the student would not normally receive services, such as during the summer months or after the student's eligibility for services has ended.

In determining whether an award of compensatory educational services is justified, most courts have applied a rationale similar to that used in tuition reimbursement cases. These courts have ruled that compensatory services, like reimbursement, simply compensate the student for a school district's failure to provide an appropriate placement. The reasoning behind compensatory educational services awards is that an appropriate remedy should not be available only to those students whose parents could afford to provide them with an alternate educational placement while litigation was pending.[46] Generally, compensatory services are provided for a time period equal to the period when the child was denied services[47] and may be granted even after the student has passed the ceiling age for eligibility under IDEA.[48] As is the case with tuition reimbursement, awards of compensatory educational services are granted only when a hearing officer or court has determined that a district failed to provide an appropriate placement.

Attorney Fees

The costs of litigation can be very high for parents as well as school districts. Many parents, after successfully bringing a lawsuit against a district, believed that they should be reimbursed for their legal expenses. These parents felt that they achieved a hollow victory when they prevailed in their disputes, but were left with burdensome legal bills.

In 1984 the Supreme Court held that recovery of legal expenses was not available under the IDEA.[49] However, two years later Congress responded by amending the IDEA with the Handicapped Children's Protection Act (HCPA).[50] The HCPA gave courts the power to grant an award of reasonable attorney fees to parents who prevailed against school districts in any actions or proceedings brought pursuant to the IDEA. The award is to be based on the prevailing rates in the community in which the case arose. Under the HCPA, the courts may determine what is a reasonable amount of time to have spent preparing and argu-

ing the case in terms of the issues litigated. An award may be limited if a school system made a settlement offer more than ten days before the proceedings began that was equal to or more favorable than the final relief obtained. A court may reduce a fee award if it finds that the parents unreasonably protracted the dispute, the attorney's hourly rate was excessive, or the time spent and legal services furnished were excessive in light of the issues litigated. The HCPA was made retroactive to July 4, 1984, the day before the Supreme Court declared that attorney fees were not available under the IDEA.

Discipline

Probably the most controversial legal issue in special education concerns the imposition of disciplinary sanctions on students with disabilities. This is a very sensitive issue as it pits the duty of administrators to maintain order, discipline, and a safe school environment against the rights of special education students to receive free appropriate public educations in the least restrictive environments. Even though most will agree that the power of school officials to maintain discipline should not be frustrated, it must be understood that a student should not be denied the rights accorded by the IDEA if the misconduct in question is caused by the child's disability.

School officials may impose disciplinary sanctions on special education students as long as they follow procedures that do not deprive the children of their rights. As such, administrators may use normal disciplinary sanctions, including suspensions, with special education students by following usual procedures and providing customary due process.[55] Administrators do face some restrictions when they intend to impose more drastic punishments such as an expulsion or wish to change a student's placement for disciplinary reasons. Basically, in these situations the due process procedures in the IDEA replace the normal due process protections.

A long line of case law held that students with disabilities could not be expelled for misconduct that was related to their disabilities but could be excluded if there was no relationship between their misconduct and disability.[56] While the Supreme Court's landmark decision in *Honig v. Doe*,[57] supported the prohibition of expelling students for disability-related misconduct, it has stated that special education students may be suspended for up to ten days. During that cooling off period, school personnel may attempt to negotiate an alternative placement with a student's parents. If they are unsuccessful, and can show that the student is truly dangerous, educators may obtain an injunction or administrative order

allowing them to exclude the student from school.[58]

A 1997 amendment to the IDEA allows educators to transfer a student who is found in possession of a weapon or drugs to an alternative educational setting for a period of up to 45 days.[59] This may be done even over the objections of the student's parents.

The 1997 amendments also stipulate that districts must continue to provide educational services to special education students who have been properly expelled for conduct unrelated to their disabilities.[60] This provision codified existing policy from the United States Department of Education which maintained that educational services must be provided in this situation[61] and reversed a controversial decision of the Fourth Circuit which held that no such requirement existed under the IDEA.[62]

Anti-Discrimination Laws

In addition to the IDEA, students with disabilities have rights under, and are protected by, two other significant pieces of federal legislation. The first, section 504 of the Rehabilitation Act of 1973, provides that "[n]o otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[63] The second law, the ADA,[64] was passed in 1990 to provide "a comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[65] The ADA effectively extends the protections of section 504 to the private sector but has implications for public entities such as schools.

Although most students with disabilities are covered by the IDEA, section 504, and the ADA, some may be protected only by the latter two statutes. Since a student must require special education services to fall under the auspices of the IDEA, a student with a disability who does not need special education services would be protected only by section 504 and the ADA. In fact, one court has held that section 504 does not require affirmative efforts to overcome a student's disability but only prohibits discrimination on the basis of the disability.[66]

Section 504 and the ADA both require school districts to provide reasonable accommodations to a student with disabilities. Accommodations may involve modest adjustments such as allowing a student to be accompanied in school by a service dog[67] or providing basic health services that would allow a physically disabled student to be present in the classroom.[68] However, accommodations that are

unduly costly, create an excessive monitoring burden, expose others to excessive risk, or fundamentally alter the nature of a program generally are not required.[69]

Conclusion

Federal laws guaranteeing students with disabilities free appropriate public educations and prohibiting discrimination on the basis of the disabilities have provided these pupils with unprecedented access to the public schools. At the same time, implementing these laws has not been without controversy. As a result of disputes between parents and school district officials, thousands of law suits have been filed in the past two decades making this one of the most explosive areas of school law.[70]

Litigation is costly both in terms of dollars and in the expenditure of human capital. It is far better to devote available resources to the education of children than to litigation. Administrators who understand the law are in a much better position to make legally-correct decisions and thus avoid costly litigation.

Notes

1 20 U.S.C. § 1400 *et seq.* The law is referred to by its current title throughout this chapter.

2 29 U.S.C. § 794.

3 42 U.S.C. § 12101 *et seq.*

4 For more in-depth discussion of these issues see Allan G. Osborne, Jr., *Legal Issues in Special Education*, (1996) or S. B. Thomas and C. J. Russo, *Special Education Law: Issues and Implications for the '90s*, NOLPE, (1995).

5 34 C.F.R. § 300.8

6 458 U.S. 176 (1982).

7 *Harrell v. Wilson County Sch.*, 293 S.E.2d 687 (N.C. Ct. App. 1982); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990).

8 *Geis v. Bd. of Educ. of Parsippany-Troy Hills*, 774 F.2d 575 (3rd Cir. 1985).

9 *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411 (1st Cir. 1985); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990).

10 *Nelson v. Southfield Pub. Sch.*, 384 N.W.2d 423 (Mich Ct. App. 1986); *Barwacz v.* Michigan Dept. of Educ., 681 F. Supp. 427 (W.D. Mich. 1988).

11 *Pink v. Mt. Diablo Unified Sch. Dist.*, 738 F. Supp. 345 (N.D. Cal. 1990).

12 20 U.S.C. § 1401 (a) (18) (B).

13 *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985), *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156 (4th Cir. 1991), aff'd on other grounds sub nom. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

14 *Board of Educ. of East Windsor Reg'l. Sch. Dist. v. Diamond*, 808 F.2d 987 (3rd Cir. 1986); *Polk v. Susquehanna Intermediate* Unit 16, 853 F.2d 171 (3rd Cir. 1983).

15 *Chris C. v. Gwinnett County Sch. Dist.*, 780 F. Supp. 804 (N.D. Ga. 1991).

16 *J.S.K. v. Hendry County Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991).

17 20 U.S.C. § 1412 (5) (B).

18 *Oberti v. Board of Educ. of the Borough of Clementon Sch. Dist.*, 995 F.2d 1204 (3rd Cir. 1993); *Sacramento City Unified Sch. Dist. Bd. of Educ. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994).

19 *Id.*, Rachel H.

20 *See* e.g., *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F. 3d 1396 (9th Cir. 1994); *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995).

21 34 C.F.R. § 300.551 (a).

22 *See*, e.g., *Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983).

23 *Gladys J. v. Pearland Indep. Sch. Dist.*, 520 F. Supp. 869 (S.D. Tex. 1981).

24 *Chris D. v. Montgomery County Bd. of Educ.*, 743 F. Supp. 1524 (M.D. Ala. 1990).

25 *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983).

26 *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985).

27 *McKenzie v. Jefferson*, EHLR 554:338 (D.D.C. 1983).

28 *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136 (D.D.C. 1979).

29 *See*, e.g., *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1983).

30 *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979), rem'd sub nom. *Battle v. Commonwealth of Pa.*, 629 F.2d 269 (3d Cir. 1980), on rem'd 513 F. Supp. 425 (E.D. Pa. 1981).

31 *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981).

32 20 U.S.C. § 1401 (a) (17).

33 *Id.*

34 34 C.F.R. § 300.24.

35 *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

36 *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999).

37 20 U.S.C. § 1401 (a) (25).

38 20 U.S.C. § 1401 (a) (26)

160

39 20 U.S.C. § 1415 (e) (2).

40 *See*, e.g., *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348 (5th Cir. 1983).

41 See, e.g., *Ft. Zumwalt Sch. Dist. v. Missouri State Bd. of Educ.*, 865 F. Supp. 604 (E.D. Mo. 1994).

42 *See*, e.g., *W.G. v. Matula*, 67 F.3d 484 (3rd Cir. 1995); *Whitehead v. School Dist. for Hillsborough County*, 918 F. Supp. 1515 (M.D. Fla. 1996).

43 *Burlington Sch. Comm. v. Department of Educ.*, Commonwealth of Mass., 471 U.S. 359 (1985).

44 *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

45 *See*, e.g., *Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940 (7th Cir. 1986); *Straube v. Florida Union Free Sch. Dist.*, 801 F. Supp. 1164 (S.D.N.Y. 1992).

46 *See*, e.g., *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990); *Todd D. v Andrews*, 933 F.2d 1576 (11th Cir. 1991); *Manchester Sch. Dist. v. Christopher B.*, 807 F. Supp. 860 (D.N.H. 1992).

47 *See*, e.g., *Valerie J. v. Derry Cooperative Sch. Dist.*, 771 F. Supp. 483 (D.N.H. 1991); Big *Beaver Falls Area Sch. Dist. v. Jackson*, 624 A.2d 806 [861] (Pa. Commw. Ct. 1993).

48 *See*, e.g., *Pihl v. Massachusetts Dept. of Educ.*, 9 F.3d 184 (1st Cir. 1993); *Jones v. Schneider* 896 F. Supp. 488 (D.V.I. 1995).

49 *Smith v. Robinson*, 468 U.S. 992 (1984).

50 Codified at 20 U.S.C. § 1415 (e) (4) (B).

51 *See*, e.g., *Verginia M.C. v. Corrigan-Camden Indep. Sch. Dist.*, 909 F. Supp. 1023 (E.D. Tex. 1995).

52 *Howie v. Tippecanoe Sch. Corp.*, 734 F. Supp. 1485 (N.D. Ind. 1990).

53 *Beard v. Teska*, 31 F.3d 942 (10th Cir. 1994).

54 *Mr. D. v. Glocester Sch. Comm.*, 711 F. Supp. 66 (D.R.I. 1989); *Hall v. Detroit Pub. Sch.*, 823 F. Supp. 1377 (E.D. Mich. 1993).

55 Those procedures were spelled out in *Goss v. Lopez*, 419 U.S. 565 (1975).

56 *See*, e.g., *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981).

57 484 U.S. 305 (1988). The IDEA Amendments of 1997 § 615 (k) (1) (B) require school officials to conduct a functional behavioral assessment and take action to address the student's misconduct within 10 days of taking disciplinary action.

58 *Id.*, IDEA Amendments of 1997 § 615 (k) (2).

59 IDEA Amendments of 1997 § 615 (k) (1) (A). For a definition of dangerous weapons see 18 U.S.C. § 930.

60 IDEA Amendments of 1997 § 612 (a) (1) (A).

61 New Letter, EHLR 213:258 (OSERS 1989); Davis Letter, 16 EHLR 734 (OSERS 1989); Symkowick Letter, 17 EHLR 469 (OSERS 1991); Smith Letter, 18 IDELR 685 (OSERS 1992); Uhler Letter, 18 IDELR 1238 (OSEP 1992); Taylor Letter, 20 IDELR 542 (OSERS 1993); Boggus Letter, 20 IDELR 625 (OSEP 1993); Price Letter, 20 IDELR 1256 (OSERS 1993); Hartman Letter, 23 IDELR 894 (OSEP 1995). These policy letters are consistent with the Fifth Circuit's ruling in *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981).

62 *Commonwealth of Virginia Dept. of Educ. v. Riley*, No. 95-2627 (4th Cir. Feb. 5, 1997). In an earlier decision, the Ninth Circuit issued a similar ruling, *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), aff'd on other grounds, *Honig v. Doe*, 484 U.S. 305 (1988).

63 29 U.S.C. § 794.

64 42 U.S.C. § 12101 et seq.

65 42 U.S.C. § 12101 (b) (2).

66 *Lyons v. Smith*, 829 F. Supp. 414 (D.D.C. 1993).

67 *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947 (E.D. Cal. 1990).

68 *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

69 *See, e.g., Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989); *Eva N. v. Brock*, 741 F. Supp. 626 (E.D. Ky. 1990).

70 Zirkel, P. A., and S. N. Richardson, "The 'Explosion' in Education Litigation," 53 *Educ. L. Rep.*, 767 (1989).

CHAPTER ELEVEN

Religious Influences and The Public Schools:
Surveying the Contemporary Wall of Separation

■ by Charles B. Vergon & Robert J. Beebe

"[Government] shall make no law respecting an establishment of religion or preventing the free exercise thereof..."

— FIRST AMENDMENT, UNITED STATES CONSTITUTION

Few issues generate as much public debate as the proper relationship between church and state in the field of public education. In almost every community various groups hold widely differing perspectives on this question. Some subscribe to strict separatist principles and perceive the First Amendment as a high and impenetrable wall shielding the public schools from any and all religious activities and influences. Other groups adopt an accommodationist perspective, viewing it as both impractical and inappropriate to shield the schools from the pervasive influence of religion on American life and even government. For these latter groups, church and state are separated by a low and permeable wall through which numerous religious influences may pass.

The presence of these perspectives may spark controversy with respect to a broad array of religious activities and influences which are either permitted or prohibited by state laws or school district policies or practices. The literally thousands of pages of judicial opinions attempting to interpret the Religion Clauses found in the First Amendment attest not only to the controversial and enduring nature of this public debate, but also to the ambiguity of the law and the absence of clear and definitive legal guidelines upon which to base local policy. As the United States Supreme Court has openly acknowledged, it operates without any precise constitutional

calipers in deciding church-state controversies, something especially evident in its decisions involving public elementary and secondary schools.

The Tests of Constitutionality

Instead of articulating an extensive set of legal guidelines, the Court has adopted a general framework for deciding which educational policies and practices are constitutional and which are not the Establishment Clause. This framework, referred to as the *Lemon* test because it was first set out in a 1971 case, *Lemon v. Kurtzman*,[1] consists of three questions that must be considered in evaluating any policy involving religious influences and public education. Policies not satisfying this test violate the Establishment Clause of the United States Constitution.

1. Does the policy have a secular purpose?
2. Does the policy have the primary effect of neither advancing nor inhibiting religion?
3. Does the policy avoid excessive entanglements between government and religion?

Under *Lemon*, only those school district policies and practices which have a secular purpose, a neutral effect with respect to religion, and which avoid substantial entanglements between the schools and religious interests can withstand a constitutional challenge. This analysis has been de-emphasized by the Supreme Court in some recent cases and ignored or reformulated in others, particularly recent cases involving public aid to religious-affiliated schools.[2] Nevertheless, the *Lemon* test continues to be embraced, if loosely, by a majority of the Justices with some regularity in deciding church-state controversies involving religious activities and influences in public school settings.

Although claims arising out of the Free Exercise Clause have been less prominent historically in school-related controversies, a test or framework has evolved over time to evaluate such claims in schools as well as in society-at-large. As with the *Lemon* test, however, there is considerable disagreement among the current membership on the Supreme Court about the appropriate standard for reviewing claims that governmental actions or policies are unlawfully interfering with an individual's First Amendment right to the exercise of religious liberties. Until very recently, the Court seemed to suggest that whenever a neutral government policy

posed a substantial burden on the practice of one's sincerely-held religious beliefs, the state must demonstrate a compelling interest to justify its policy, and additionally show that the policy being pursued was the least intrusive means to achieve the state's legitimate objectives. Failing to satisfy this two-part *Sherbert* test,[3] the policy would be invalidated as violating the Free Exercise Clause.

A 1990 Supreme Court case, *Department of Human Resources of Oregon v. Smith*,[4] however, has substantially altered this standard for analyzing Free Exercise claims. This case lessens the state's burden of justification for laws or policies of general applicability which have an adverse effect on one's religion, at least where the laws stop short of compelling affirmative conduct inconsistent with one's religious beliefs. The currently prevailing standard, as articulated in *Department of Human Resources of Oregon v. Smith*,[3] provides that the state need not provide a compelling justification for applying generally applicable laws to those engaged in religious practices, since otherwise an individual's obligation to comply with a law would depend on its coincidence with one's religious beliefs. This proposition that would be unworkable in a religiously pluralistic society according to the reasoning of the Court's majority. This standard was reaffirmed recently when the Religious Freedom Restoration Act,[5] passed by Congress in 1993 in an attempt to re-establish the compelling state interest test, was struck down by the Court in *City of Borne v. Flores*.[6] The Supreme Court has continued to acknowledge that when parental interest in guiding the education of their children is combined with a Free Exercise claim, the state may have to demonstrate more than "a mere reasonable relationship" between the policy challenged and a legitimate state purpose.[7] Readers should keep this recent flux in legal standards in mind while reading the discussion of selected Free Exercise cases in this chapter, especially those decided prior to 1988.

Surveying Religious Activities and Influences Along the Wall of Separation

How have various school policies and practices fared when examined by the Supreme Court and lower federal courts? Which are constitutionally permissible? Which have been found constitutionally impermissible? And for what types of policies or activities are legal guidelines still unclear? To answer these questions, this chapter contains a brief survey of United States Supreme Court precedent and a sampling of federal appellate court rulings pertaining to various practices that bring religious influences into close proximity with public schools and schooling. Due to the relatively fluid nature of the law in this area, the level of disagreement

among Supreme Court Justices on certain theories and their appropriate application in school cases, and shifting membership on the Court itself, administrators must approach this area of policy and practice with considerable caution. A useful guide in this area is a joint statement of Principles on Religion in the Public Schools, subscribed to by over twenty national organizations. Consultation with legal counsel is always recommended when a constitutional controversy looms, but it may be especially advisable in the church-state realm because of the highly fact-sensitive nature of much of the Court's precedent in this area of the law.

A final cautionary admonition to the reader: while this chapter reviews federal law, certain policies which may not violate federal constitutional constraints against the establishment of a religion, may nevertheless conflict with even more stringent state constitutional or statutory provisions governing the separation of church and state. Conversely, some state laws may guarantee more expansive Free Exercise rights to individual citizens, requiring a greater degree of governmental accommodation than the Free Exercise Clause of the United States Constitution might otherwise require. For this reason, state, as well as federal law may be pertinent in resolving controversies of the nature described in this chapter.

Prayers and Silent Meditation As Part of the School Day

State laws and local policies which either permit or require school officials to lead or encourage the recitation of prayers as part of the regular school day represent an establishment of religion in violation of the First Amendment according to a series of cases decided by the Supreme Court in the early 1960s. These policies were found to be unconstitutional in *Engel v. Vitale*[9] and *School District of Abington Township v Schempp*,[10] regardless of whether the prayer was nondenominational in nature or whether student participation was considered purely voluntary.

This constitutional prohibition on school-sanctioned prayer as part of the regular school day has also recently been construed by a lower federal court to bar a district's practice of allowing a student group's morning prayers and devotionals to be broadcast over the school intercom immediately following the principal's announcements.[11] The court found the practice had the primary effect of advancing religion in violation of the *Lemon* test. Although the practice was initiated by students, the court reasoned that religious expressions contemporaneous with the start of the official school day implied recognition of religious ideas as part of the school day and implicit approval of the beliefs advocated.

The Supreme Court has also considered the constitutionality of state laws authorizing a moment of silence at the beginning of the school day for prayer, meditation or reflection. The constitutionality of such moment of silence laws depends largely on an analysis of the reasons and circumstances surrounding their adoption as illustrated in the Supreme Court's 1985 ruling in *Wallace v. Jaffree*.[12] In *Wallace* the Supreme Court declared unconstitutional an amendment to a pre-existing Alabama moment of silent meditation law that added the word "prayer" to the list of approved uses for the moment of silence. The court found that the amendment had the purpose of promoting prayer and the primary effect of advancing religion. Other cases have illustrated that whether the policy itself includes or excludes the word "prayer" from the list of suggested silent activities is less material to the determination of its constitutionality than is the actual motivation for the policy's adoption.[13] On the other hand, where there is a secular rationale for the moment of silence and its implementation does not have the primary effect of advancing or inhibiting religion, the observance of a moment of silence is presumably constitutional. Five Justices unofficially subscribed to that view in dicta in *Wallace*.[14] Of course, it is important also to keep in mind that since the First Amendment only prohibits governmentally-sponsored prayers and religious practices, nothing precludes an individual student from pausing in silent prayer anytime during the school day, irrespective of whether or not the district has adopted a moment of silence policy.

Ceremonial Invocations at School-Related Events

While it has long been settled that officially-encouraged prayer as part of the regular school day violates the Establishment Clause of the First Amendment, the issue of ceremonial prayers as part of school-related activities has only recently commanded judicial attention. During the late 1980s and early 1990s, lower federal courts took varying views on the constitutionality of such practices. In 1992, however, the Supreme Court heard a case involving a middle school principal who, consistent with local school district policy, included a brief invocation and benediction as part of a graduation ceremony. The principal invited a member of the local clergy to offer the prayer and provided the clergy member with a pamphlet and oral guidance concerning the an appropriate nonsectarian prayer for such a civic occasion. The Supreme Court in this case, *Lee v. Weisman*, ruled that the "government may not coerce anyone to support or participate in a religion or its exercise, or otherwise act in a way that establishes a state religion or reli-

gious faith or tends to do so."[15] The Supreme Court found the school-directed ceremonial invocation and benediction signified an endorsement of religion in violation of the Establishment Clause of the First Amendment, even though attendance at graduation was not technically required for a student to receive a diploma. The Court found that students were placed in the position of choosing between forgoing one of life's most significant ceremonies or exposing themselves to religious exercises and a significant measure of coercion to participate in them. The Court majority rejected the school's arguments that such civil prayers serve the secular purpose of solemnizing public occasions or that they present less of an opportunity for indoctrination since they are infrequent in occurrence and are delivered outside the normal authority relationship of student and teacher.

The Court's ruling in *Lee* did not end the question of ceremonial prayer. Many school districts sought ways to maintain this traditional practice in conjunction with public school graduations, as well as at other school-related events such as athletic contests. A number of school districts, for instance, adopted or continued to pursue policies allowing students to vote to determine whether or not to have nonsectarian prayers at their graduation exercises, and if so, to determine who should deliver them. The Fifth Circuit in *Jones v. Clear Creek Independent School District*[16] approved such a policy and practice, reasoning that the religious activity was not state-directed and that it occurred at a once-in-a-lifetime event where it served more of a solemnizing than a proselytizing purpose. The Ninth Circuit struck down a similar arrangement as unconstitutional in *Harris v. Joint School District No. 1*,[17] noting that it did not effectively alleviate the dilemma the inclusion of prayer poses to dissenting students. The Third Circuit, in *ACLU v. Black Horse Pike Regional School District*[18] reached a similar conclusion of unconstitutionality regarding such student-initiated graduation prayers, ruling that a board may not delegate to students decisions that it would be unlawful for the board itself to make.

Other cases involving student-initiated prayers focused on their constitutionality in the context of school sporting events and assemblies, as contrasted to graduation ceremonies. In a 1995 case, *Doe v. Duncanville Independent School District*,[19] the Fifth Circuit ruled that a school district's practice of allowing employees to participate or otherwise show solidarity with students who initiated prayers during school-sponsored basketball practices and games violated the Establishment Clause. In *Ingebretsen v. Jackson Public School District*,[20] the Fifth Circuit also struck down a state law which would have permitted student-initiated, non-proselytizing prayers of a voluntary nature at non-compulsory stu-

dent assemblies and sporting events. The Ninth Circuit reached a similar conclusion in *Collins v. Chandler Unified School District*,[21] holding that a student-led prayer at a school assembly was voluntary. The Eleventh Circuit in *Jaeger v. Douglas Country School District*[22] also ruled unconstitutional a school district practice of permitting self-selected members of the local clergy to deliver invocations using the district's public address system prior to school athletic contests.

In the spring of 2000, the Supreme Court ruled on the constitutionality of a school district policy permitting students to determine whether an invocation or solemnizing message would be offered at a school-sponsored event. The Santa Fe Independent School District had adopted a policy permitting students to choose whether a brief invocation or message should be delivered during pre-game ceremonies to solemnize the event and promote good sportsmanship. If the students decided in the affirmative, the policy provided for a second election to select a student who would determine the message and deliver it prior to each game. The Supreme Court held the district policy to be unconstitutional on its face, finding it a clear violation of the Establishment Clause in *Santa Fe Independent School District v Doe*.[23] In arriving at its decision, the Court rejected the district's argument that the speech was private speech. The Supreme Court majority noted that the invocations were authorized by a government policy and that the student voting mechanism to determine whether invocations would take place was designed and presided over by school officials. The Court pointed out that the invocations would take place at a school-sponsored event, on government property, and with the benefit of a public address system over which school officials exercised control. Given these factors, the Court found that an objective observer would perceive the activity as state endorsement of prayer and religion. The Court also found elements of the coercion prohibited by *Lee*. After observing the susceptibility of adolescents to peer pressure, the Court concluded: "Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pre-game prayer has the improper effect of coercing those present to participate in an act of religious worship."[24] In light of this recent development, the fact that prayers or solemnizing messages are initiated by students is unlikely to shield them from close judicial scrutiny and, in many instances, from successful constitutional challenges. In other words, if challenged, prayer at school-related activities is likely to be struck down.

Bible-Reading and Distribution

Daily Bible-reading in the public schools directed by school staff pursuant to state law, local policy or classroom practice is prohibited by the Establishment Clause, according to the Supreme Court's 1963 ruling in *School District of Abington Township v Schempp*.[25]

This does not mean that the Bible may never be used in the public schools. What it does mean is that the Bible, or excerpts from it, may only be used as part of a secular course of instruction intended to neither encourage nor discourage religious beliefs or precepts. The Bible, for instance, may be used in a course in literature or comparative religion where the course is in fact secular in orientation and presentation. A related issue is whether Bibles or religious materials may be distributed to students on school premises. Since 1978, at least two federal circuits, the Fifth[26] and the Seventh,[27] ruled that the school-sanctioned distribution of Gideon Bibles to students on school property was unconstitutional. The Fourth Circuit has reached a contrary conclusion where a district had a history of permitting outside groups to distribute materials and restricted the dissemination to one day per year from a table designated by school officials.[28] The Seventh Circuit has also ruled on the constitutionality of school policies governing the distribution of materials by students, particularly as they apply to materials containing religious content or viewpoints. In one case, the court struck down provisions of a policy that absolutely prohibited the dissemination of any student-prepared materials with religious content, finding the policy in violation of the First Amendment by virtue of its singling out religious material for exclusion.[29] The court did uphold the authority of the district to require prior administrative review of all materials, to limit the number of copies of non-student prepared materials that may be disseminated, and to restrict the distribution to a few tables designated for that purpose near the entrance to the school. In the second case, the court approved as "reasonable," rules regulating the distribution of student materials in an elementary school setting where they were applied to religious and non-religious materials alike, including rules requiring prior administrative review and that a disclaimer appear on the materials stating that the contents were not endorsed by the school.[30]

Religious Education and Education About Religions

The teaching of religion is strictly forbidden on public school premises, even when the instruction is provided by non-public school personnel at no cost to the public schools or taxpayers. This was the 1948 holding of the Supreme Court in

Illinois ex rel. McCollum v. Board of Education,[31] in which the Court observed that such religious education programs are unconstitutional, regardless of whether requesting students are excused from participating in the classes. Schools, however, may excuse students from school for a limited amount of time weekly, at certain ages or grade levels, so that they may attend religious education classes conducted by members of the local clergy at locations off school premises. The Court ruled to that effect in a 1952 case, *Zorach v. Clauson*.[32]

Even though public schools are precluded from teaching religious education, the Supreme Court has made it equally clear that they may teach about religion: "[o]ne's education can hardly be considered complete without an appreciation of the role of religion in our history and culture."[33] In assessing whether a school is engaged in the impermissible teaching of religion or the permissible teaching about religions, courts have identified a number of factors, the most important of which are the objectives and content of the instruction. In addition to being prohibited from including religious education programs in the formal curriculum, school districts enjoy considerable authority to guard against the implicit teaching or advancement of religion in their schools. The Tenth Circuit has upheld a school district directive barring a fifth-grade teacher from reading the Bible in the presence of his students during a classroom silent reading period or from making two of his own books on Christianity available in the classroom library.[34] The district believed that the teacher was proselytizing. The Ninth Circuit, in an analogous set of circumstances, held that a school district could restrict a teacher from talking with students about religion on school grounds during the school day, including times when he was not actually teaching class.[35] The court found the restriction justified by the district's interest in avoiding an Establishment Clause violation based on its assessment of the primary effect of the teacher's speech.

Evolution and Creationism in the Curriculum

State laws or policies either prohibiting the teaching of evolution or requiring the balanced treatment of creation-science in schools where evolution is taught have also fueled controversy and court action. In 1967, the Supreme Court in *Epperson v. Arkansas*,[36] struck down a state anti-evolution statute, reasoning that it sought, for purely religious purposes, to exclude from the curriculum content with which a particular religious group disagreed. More recently, laws requiring the balanced teaching of creation-science and evolution have been the subject of litigation. The Supreme Court declared one such law unconstitutional in *Edwards v. Aguillard*,[37]

finding in this 1987 case that the statute was religiously-motivated, lacked a secular purpose, and had the primary effect of advancing religion. The requirement that creation science was to be taught only in schools already teaching the Darwinian theory of evolution was not considered material by the Court. In still another, and more recent evolution-related controversy, the Ninth Circuit rejected a high school biology teacher's claim that compelling him to teach evolution as a valid scientific theory represented the promotion of a religious belief system in contravention of the Establishment Clause.[38]

Curricula and Materials Antithetical to Religious Values

In addition to situations where traditional religion is arguably advanced either explicitly or implicitly via the school curriculum, the Establishment Clause and the Free Exercise Clauses have been invoked by parents who claim that the schools are hostile to their particular religious beliefs and theistic world view they often contend that the schools are supportive of an atheistic or anti-Christian "religion of secularism." Several cases illustrate such challenges and the manner in which federal appeals courts have resolved them.The Eleventh Circuit, in *Smith v. Board of School Commissioners of Mobile*,[39] was asked to review home economics, history, and social studies textbooks for allegedly advancing secular humanism and inhibiting theistic religion. The court ruled that the home economics textbooks had appropriate secular educational purposes and did not preclude the possibility that religion was a source of moral values. The court also found that the history and social studies textbooks, which failed to contain references to certain historic events or allegedly to adequately integrate the place of religion in modern society, did not advance secular humanism or inhibit theistic religion in violation of the Establishment Clause. This was true at least where there were professionally credible, non-religious justifications for the educational decisions made regarding the content of the textbooks in question.

The Sixth Circuit rejected a parental challenge to a basal reading program which the parents contended threatened their and their children's religious beliefs. In *Mozert v. Hawkins County School Board*,[40] parents objected on Free Exercise grounds to textbook passages they characterized as involving occult practices, supernaturalism, pacifism, nontraditional sex roles, as well as passages encouraging children to make moral judgments about whether certain societal practices are right or wrong. The court held that the mere exposure of students to ideas inconsistent with their religious beliefs through reading and classroom discussion does

not represent an unconstitutional burden on religion, even if it might lead students to conclusions contrary to their or their parents' religious beliefs. This is in apparent contrast to compelling conduct inconsistent with one's beliefs, such as mandated participation in patriotic exercises, as was found to be a violation of a student's First Amendment-protected freedom of spirit and intellect in *West Virginia v Barnette*.[41] In a third case, *Brown v. Woodland Joint Unified School District*,[42] the Ninth Circuit found that a teaching curriculum which asked children to discuss witches or create poetic chants and pretend that they were witches or sorcerers did not require the children to practice the "religion" of witchcraft in violation of the First Amendment. The court reasoned that an objective observer in the position of an elementary school student would not perceive the curriculum as endorsing witchcraft or disapproving Christianity.

Regulation of Student Projects and Assignments

In several instances, students have contested the authority of school districts to preclude them from pursuing religiously-related topics or activities in satisfying certain course requirements. In one such case, parents challenged a teacher's authority to give their ninth-grade daughter a grade of zero on a proposed research paper covering the life of Jesus Christ on Free Exercise grounds.[43] The Sixth Circuit held in favor of the teacher based on the non-religious, instructional and curricular reasoning supporting her decision. Specifically, the court observed that the teacher framed her decision in terms of the student's failure to submit the proposed topic in advance, the student's pre-existing familiarity with the topic, the limited number of sources the student proposed to rely on in preparing her paper, the difficulty inherent in evaluating research on the topic, and the inappropriateness of the topic for classroom discussion.

In another case, the Sixth Circuit sustained a school district's decision forbidding a second grade student from presenting a videotape of herself singing a proselytizing religious song in a church service as part of a required oral classroom presentation designed to develop self-confidence and verbal communication skills.[44] While the school district acknowledged wanting to avoid offending other parents and students with the religious context of the song or any implicit endorsements of its contents, officials argued that the use of the videotape defeated the assignment's purpose of promoting communications skills and self-confidence. Inserting a prerecorded video into a projector, officials maintained, would not develop the presentational skills associated with the assignment. The district also noted the use of

videotaped presentations would pose burdens on the teacher in terms of previewing them, securing district approval to show them, and arranging for the necessary equipment to replay them. Acknowledging that the classroom was a closed forum and the school could reasonably regulate both the style and content of the presentation, the Sixth Circuit affirmed. The court choose to rely on the videotaped style of the presentation rather than its content in upholding the district's action.

Religious Symbols and Holiday Observances

Crosses and other religious symbols may not adorn public school buildings or classrooms on a regular basis. Their presence may be interpreted as state endorsement of religion or a preference for one religion over another, both of which are violations of the Establishment Clause. This, of course, does not preclude the display of religious symbols or artifacts in connection with the secular or objective study of different groups of people, their cultures, works of art, or even religions. Under these circumstances, the display of religious symbols is temporary and the subject of secular as contrasted to sectarian instruction. The posting of the Ten Commandments in public school classrooms was found in 1980 to be unconstitutional by the Supreme Court in *Stone v. Graham.*[45] Their display was prohibited even though they were purportedly posted to promote good moral principles, rather than necessarily religious values. A similar outcome was reached by the Sixth Circuit in a case involving the display of a portrait of Jesus Christ hanging alone in the hallway of a secondary school for the last 30 years.[46] The court held that the display violated the Establishment Clause since it had no secular purpose, was not integrated into any course of study, and was controlled by the school. On the other hand, the same court found that the use and display of a "Blue Devil," inspired by French military lore, did not to violate the Establishment Clause.[47] The court concluded that no reasonable observer would believe that the principal or primary effect of the use of the mascot was to advance or inhibit religion or that the use of a devil as the mascot was meant to endorse or disapprove any religious choice.

Certain other symbols and ceremonies may not be as easily classified as purely secular or sectarian. Some that are religious in origin have been found to have taken on civil qualities, making their purpose and effect secular as well as sectarian. At least some lower federal courts have, for instance, permitted the inclusion of Christmas carols in school assemblies and choral programs, noting that this holiday and such songs have become secular or civil, as well as religious observances and customs. Whether the inclusion of sacred music renders an activity constitu-

tionally impermissible depends on the nature of the program, its educational or instructional purposes, the appropriateness of the selection in achieving such purposes, and the proportion of the program that the sectarian music constitutes.[48]

This type of analysis parallels that employed by the Supreme Court in evaluating the constitutionality of religious displays on city-owned property. The Court, in such settings, has observed that certain sacred symbols have taken on secular significance and that the presence of even some clearly religious symbols, such as a nativity scene in a broader public display of a secular nature, may be constitutionally permissible.[49] These cases, of course, involve displays in public parks rather than in schools, where students, because of their age and maturity, may not as readily differentiate state accommodation from state endorsement. In one such case,[50] the Eighth Circuit was asked to decide the constitutionality of school district rules permitting the observance of holidays having both a religious and a secular basis, such as Christmas. The court found that the primary effect of the rules was the advancement of a secular program of education and not of religion. The court observed that all programs and materials authorized by the rules were required to deal with the secular or cultural basis or heritage of the holidays and since the materials were required to be presented in a prudent and objective manner and religious symbols were to be used as a teaching aid.

While holidays may be recognized as part of a secular program of instruction, a state may not require the closing of public schools on a religious holiday, absent a secular justification for doing so. The Seventh Circuit held that a state law requiring public schools to be closed on Good Friday violates the Establishment Clause since Good Friday is a sectarian holiday that has not accrued a secular justification for school closing, such as saving the school system the expense of keeping schools open on a day when few teachers and students could have been expected to attend.[51] At the same time, the Eleventh Circuit found a school district's attendance policy, which limits the number of excused absences for religious holidays to two per year, violated the Free Exercise rights of students. The court decided that their church-required abstinence from secular activity on seven annual holy days forced the students to choose between following their religion or suffering a penalty for missed school work.[52]

Student Religious Groups

The Supreme Court has ruled that a state university which had a policy of granting various student groups permission to use its facilities for meetings may not deny a student religious organization's request for similar access. In 1981,

in *Widmar v. Vincent*,[53] the Court concluded that to do so would violate the students' rights of freedom of speech protected by the First Amendment. Whether groups of secondary school students enjoyed similar rights was widely debated in the aftermath of *Widmar*. Federal appellate courts divided on the applicability of equal access principles in secondary schools, with the majority siding with school officials who refused to recognize such religious groups because of the potential for Establishment Clause violations. These courts reasoned that the relative immaturity of elementary and secondary school students, as contrasted to college students, made it more likely the former would perceive the granting of recognition to such groups as the school's official endorsement of the group's religious purposes. Other factors that various federal courts cited as significant to their resolution of these cases included the district's policy governing the recognition of student groups generally; the nature and extent of the privileges conferred on student groups; the timing of the meetings; the age and grade level of students; and the need for and degree of faculty supervision provided. Partly in response to such rulings, Congress in 1984 adopted the Equal Access Act[54] prohibiting secondary schools from discriminating against certain groups in the granting of recognition and privileges afforded other student groups.

In *Westside Community Schools v. Mergens*,[55] the Supreme Court agreed that the Equal Access Act prohibited high school officials from denying the request of students to form a Christian club. The school had previously created a "limited open form" by recognizing a number of noncurricular-related student organizations and permitting them to meet on school premises during noninstructional time. The Court also found that the Equal Access Act did not, on its face or as applied, violate the Establishment Clause. In arriving at this conclusion, the Court noted that the Act met the secular purpose test by granting equal access to all noncurricularly-related student clubs without regard to the secular or religious content of their speech. The Court added that the Act neither advanced nor inhibits religion since meetings are restricted to non-instructional times. Finally, the Court decided that the Act did not result in excessive entanglements since it prohibited school sponsorship of religious meetings and limited the role of faculty to monitoring such meetings for compliance with general school rules.

The resultant growth in student-initiated clubs of a religious nature has spawned additional litigation. The Ninth Circuit, for instance, has heard a student group's challenge to a school district's refusal to permit them to use a classroom for religious purposes just prior to the start of the school day.[56] The

court held such a refusal neither violated the student's First Amendment expressive rights nor the Equal Access Act, where the district had historically declined to create a limited public forum, instead only permitting curricularly-related organizations to meet on school premises. Even more recently, the Second Circuit was asked to consider whether a school district may impose its nondiscrimination policy on a Bible club to require that all students be eligible for office in the club regardless of their religious beliefs. The court concluded that the Equal Access Act did not require such uniform application of school rules and that such a reading would operate to bar the organization from expressing the beliefs that it was formed to advance.[57] In addition, the court asserted that such an exemption from the uniform application of school rules did not violate the Establishment or Equal Protection Clauses, since in the first instance the exemption served the secular purpose of promoting access and in the latter regard distinctions made on the basis of religion by a religious group were not invidious for purposes of the Fourteenth Amendment.

Use of School Facilities by Community Religious Groups

A related issue is whether public school districts are permitted, or required, to make school facilities available after school hours or on weekends to religious organizations in the community for various purposes. Many states have laws that authorize school districts to make school facilities available to community groups for civic, recreational, or educational purposes. Districts permitting such use are generally required to prescribe regulations governing the use of the facilities and to ensure reasonable and impartial use of school properties. Where a state authorizes community use of school facilities, but a school district pursues a consistent policy or practice of not permitting such usage, the district presumably would be under no obligation to open the schools to any organization, religious or otherwise. On the other hand, where a school district makes facilities available to community groups for various purposes, then presumably all groups would be legally entitled to use the facilities for such purposes, subject to the same qualifications and conditions applicable to other groups.

The Supreme Court's 1993 ruling in *Lamb's Chapel v. Center Moriches School District*[58] confirmed these general principles. The Court found that the school district violated the First Amendment free speech rights of a religious organization when it refused to grant permission to use school facilities for a series of evening lectures on family issues to which members of the general public were invited. The

district contended that it denied the request because of the religious nature of the meeting and that its failure to deny the request would have resulted in an inappropriate relationship between church and state in violation of the Establishment Clause. The Supreme Court disagreed, finding that the purpose of the meeting, discussing family issues, was within the educational and civic purposes for which school facilities were routinely made available, and that the district inappropriately applied its own policy by denying this group's request solely on the basis of the religious perspective the group brought to family issues. Noting the independent sponsorship of the meetings, the fact they were open to the public, and that they were scheduled after regular school hours, the Court concluded that allowing such usage did not pose an Establishment Clause problem.

The Supreme Court expressly noted in *Lamb's Chapel* that it was not presented with a situation in which the group had requested to use the school facilities for a religious purpose or exercise, as contrasted to a purpose of the type expressly authorized under state law and local policy. The use of a school for a religious service would raise certain Establishment Clause concerns more directly, including the provision of public support for a religious purpose. This objection might be reduced somewhat by requiring the religious organization to pay a reasonable and customary rental fee. The issues of symbolic support and endorsement of religion, or of one religion over another might persist, particularly if the arrangement were long-term in nature.[59] Such practices require consideration on a case-by-case basis in light of the particular facts and circumstances.

General Guidelines for School Policies and Practices

The Supreme Court and lower federal court cases reviewed above illustrate the sometimes uneasy tension that school districts must maintain between the interests of church and state and the principles of separation and accommodation. The following recommendations offer general guidelines for balancing religious issues in the public schools.

1. Religious feelings and attitudes run deep and strong across the national landscape. This same statement may be made concerning anti-religious feelings and attitudes. School districts should be vigilant to avoid actions by school board members or employees that will violate constitutional requirements. Both Establishment Clause neutrality and Free Exercise non-interference should be watchwords for daily school operations. Up-to-date policies and appropriate training should be provided to all employees and

school board members in order to ensure awareness of the often elusive and seemingly contradictory nature of these First Amendment principles.

2. This area of constitutional law is continuing to evolve, both due to the nature of the controversies being brought to the federal courts and because of the changing political composition of the federal judiciary. School districts should maintain contact with legal counsel concerning religion in the schools, both as current policies and understandings are implemented and as new policies are developed.
3. Laws or policies which permit or require school prayers are clearly unconstitutional as inconsistent with the Establishment Clause. The permissibility of official moments of silence for prayer, meditation or reflection depends upon the specific circumstances surrounding the adoption and implementation of such policies. School districts should exercise careful judgment concerning both the intent and the likely effects of moments of silence. School districts and employees should, consistent with the Free Exercise Clause, also refrain from unnecessary interference with voluntary devotional activities by individual students that do not conflict with the conduct of education in the schools.
4. School ceremonies are secular events that sometimes take on religious overtones because of the inclusion of traditional invocations or benedictions. School-initiated or officially-guided prayers at such ceremonies are clearly prohibited. School policies permitting students to vote on the inclusion of prayer or solemnizing messages at graduation or school-sponsored assemblies or sports contests are also prohibited when the message's religious content is encouraged by the school.
5. Bibles have not been banned from the public schools, but their use by schools as devotional materials has been prohibited. No case has directly held that the Bible may not be studied as part of a secular course of instruction, for example, in such areas as literature or comparative religion. The distribution of Bibles to students on school premises by representatives of religious organizations or with the acquiescence of school officials has generally been prohibited as unconstitutional. Whether students may disseminate materials including religious notices or content may depend on whether the school routinely permits the dissemination of materials of a non-religious nature, although any dissemination of materials may be restricted in terms of time, place and manner so as not to disturb the educational process or convey official approval of religious teachings. School districts should not

permit the personal views of individual employees or school board members to take precedence over these Establishment Clause principles.

6. Religious schools and religious education were in place in the United States long before the public schools were established. To the current day, one reason for the continuing appeal of religious schools for many families is the explicit attention that such schools devote to spiritual development. The mission of the public school is clearly different from that of the religious school. The public schools may not teach religious education, but may teach about religion. Teacher speech or other conduct that has the effect of promoting or inhibiting religious beliefs or practices are likewise prohibited by the Establishment Clause and may be barred by district policy or directive. Public school districts should understand and assume their particularized role in the education and honor the historical distinction that has developed between religious and secular education.
7. The debate in the public schools, and in the courts, among those who advocate the teaching of evolution, the teaching of creation-science, and the teaching of both appears to have been resolved on Establishment Clause grounds in favor of the teaching of evolution alone. Although fresh arguments may yet be offered that will extend the discussion, school districts may well not need to debate what the law provides regarding this controversial and divisive issue. The secular orientation and content of the public school curriculum has generally not been found to represent an unconstitutional burden under the Free Exercise Clause nor the promotion of a religion of secularism in violation of the Establishment Clause, merely because of the presence of ideas which some may find to be in disagreement with their religious beliefs.
8. School district displays of religious symbols, such as crosses, the Ten Commandments, and religious portraits, violate the Establishment Clause unless they are temporary, directed toward a secular instructional purpose, and have the effect of neither promoting nor inhibiting religion. School calendars that include both religious and secular holidays do not in themselves violate the Establishment Clause, but school districts should be as attentive to questions of intent and effect in the area of religious symbols and observances as they are with respect to school ceremonies. Free Exercise or expressive rights violations may be found in school district policies that compel affirmative student conduct inconsistent with sincere-

ly-held religious beliefs, or penalize students for absences associated with the celebration of religious holy days.

9. The Equal Access Act my require school officials in districts receiving federal financial assistance to recognize student clubs that pursue religious purposes to the same extent as other student-initiated clubs of a non-curricular nature are recognized and granted privileges by the school district. Recognition of such student-initiated religious groups does not represent a violation of the Establishment Clause.
10. The Establishment Clause clearly permits school districts to make school facilities available to community groups, including religious organizations, during non-school hours for non-religious purposes of a public or civic nature. A number of unsettled Establishment issues exist concerning the use of school facilities by religious organizations for religious purposes. This is an area in which school districts should maintain continuing contact with legal counsel and seek specific advice when questions arise.

Conclusion

Church-State controversies continue to pervade the nation and its school systems. While the controversies are exceedingly varied, the constitutionality of each challenged policy or practice may be assessed by applying the principles and concepts that comprise the *Lemon* Test. By examining a policy's purpose, its effect and its potential for excessive governmental entanglements, one can begin to assess the potential for an Establishment Clause challenge. Other controversies require an assessment of the likelihood of a successful Free Exercise challenge, a risk which appears more limited, especially in light of recent Supreme Court precedent that diminishes the state's burden to justify neutral policies of general application that may coincidentally interfere with the religious beliefs of citizens. Such assessments of the potential outcome of Establishment or Free Exercise challenges to school policies and practices offer limited certainty since there are a number of issues about which there is substantial disagreement even among constitutional scholars and members of the Court. Due to the high probability of litigation when a school district either prohibits or permits various practices that implicate religion directly or indirectly, care should be used in proceeding to formulate policy and make decisions in this legally and politically sensitive area of public education policy.

Notes

1 403 U.S. 602, 612-13 (1971).

2 See e.g., *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 120 S. Ct. 2530 (2000).

3 *Sherbert v. Verner*, 374 U.S. 398 (1963).

4 494 U.S. 872 (1990).

5 Religious Freedom Restoration Act, 42 USC § 2000bb et. seq.

6 *City of Borne v. Flores*, 521 U.S. 507 (1997).

7 *See*, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1971).

8 *Religion in the Schools: A Statement of Principles* (1995).

9 370 U.S. 421 (1962).

10 374 U.S. 203 (1963).

11 *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902 (N.D. Miss. 1995).

12 472 U.S. 38 (1985).

13 *See*, e.g., *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), appeal dismissed for want of jurisdiction, 484 U.S. 72 (1987).

14 *See* concurring opinions of Justices Powell and O'Connor and dissenting opinions of Justices White, Rehnquist and Chief Justice Burger.

15 502 U.S. 577 (1992).

16 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

17 (1994), *vacated as moot*, 575 U.S. 1154 (1995).

18 84 F.3d 1471 (3d Cir. 1996).

19 70 F.3d 402 (5th Cir. 1995).

20 88 F.3d 274 (5th Cir. 1996).

21 *Collins v. Chandler Unified Sch. Dist.*, 664 F.2d 759 (9th Cir, 1981), *cert. denied*, 454 U.S. 683 (1981).

22 862 F.2d 824 (11th Cir. 1989).

23 *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000).

24 *Id.* at 2280.

25 374 U.S. 203 (1963).

26 *Meltzer v. Board of Pub. Instruction of Orange County*, 577 F.2d 311 (5th Cir. 1978), *cert. denied* 439 U.S. 1089 (1979).

27 *Berger by Berger v. Rensselaer Central Sch Corp.*, 982 F.2d 1160 (7th Cir. 1993).

28 *Peck v. Upshire County Bd. Ed.*, 155 F.3d. 274 (4th Cir., 1998).

29 *Hedges v. Wauconda Comm. Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993).

30 *Muller v. Jefferson Lighthouse Sch. Dist.*, 98 F.3d 1530 (7th Cir. 1996), *cert. denied* 520 U.S. 1156 (1997).

31 333 U.S. 203 (1948).

32 343 U.S. 306 (1952).

33 *Abington, supra note 25* at 225.

34 *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied* 505 U.S. 1218 (1992).

35 *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994), *cert. denied* 515 U.S. 1173 (1995).

36 393 U.S. 97 (1967).

37 482 U.S. 578 (1987).

38 *See Peloza, supra* note 35.

39 827 F.2d 684 (11th Cir. 1987).

40 827 F.2d 1058 (6th Cir. 1987), *cert denied*, 484 U. S. 1066 (1988).

41 319 U.S. 624 (1943).

42 27 F.3d 1373 (9th Cir. 1994).

43 *Settle v. Dickson County Bd. of Educ.*, 53 F.3d 152 (6th Cir. 1995), *cert. denied*, 516 U.S. 909 (1995).

44 *DeNooyer by DeNooyer v. Livonia Pub. Schs.* 799 F. Supp. 744 (E.D. Mich. 1992), aff'd 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

45 449 U.S. 39 (1980).

46 *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994).

47 *Kunselman v. Western Reserve Local Sch. Dist.*, 70 F.3d 931 (6th Cir. 1995).

48 *See*, e.g., *Duncanville, supra* note 19, *Clever v. Cherry Hill Twp. Bd of Educ.*, 838 F. Supp. 929 (D.N.J. 1993) and *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir. 1980), discussed in text *infra*.

49 *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

50 *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980).

51 *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995).

52 *Church of God v. Amarillo Indep. Sch. Dist.*, 670 F.2d 46 (5th Cir. 1981).

53 454 U.S. 263 (1981).

54 Equal Access Act, 20 USCA § 4071 et. seq.

55 496 U.S. 226 (1990).

56 *Garnett v. Renton Sch. Dist. No. 403*, 874 F.2d 608 (9th Cir. 1989).

57 *Hsu by and through Hsu v. Roslyn Unified Sch. Dist. No. 3*, 85 F. 3d 839 (2nd Cir. 1995), *cert. denied*, 519 U.S. 1040 (1996).

58 508 U.S. 384 (1993).

59 *See* e.g., *Good News Club v. Milford Cent. Sch.*, 202 F.3d. 502 (2nd Cir. 2000); *cert granted*, 121 S.Ct. 296 (2000); and *Campbell v. St Tammony's Sch. Bd.*, 206 F.3d 482 (5th Cir. 2000).

CHAPTER TWELVE

Student Free Speech and Dress Codes

■ by David Schimmel

Few issues have provoked more debate among judges and educators than the scope and limits of student freedom and administrative control. In theory, judges and educators support both. During the past three decades, most administrators have learned to accept that students have some constitutional rights such as freedom of expression in the public schools. However, parents, teachers, administrators, and judges all agree that schools must maintain discipline and protect safety for all students and staff. Consequently, conflicts arise when some parents and children believe that school rules and administrative decisions violate their constitutional rights.

This chapter focuses on two arenas of conflict, disagreements about student freedom of expression and the related issue of school dress and grooming codes. More specifically, it examines how courts resolve these conflicts and summarizes the implications of those decisions for public school officials.[1]

Student Expression

For most of this century, the First Amendment did not protect students in public schools. Therefore, it was almost impossible for students to mount a successful challenge to school policies or administrative decisions that restricted their freedom of expression because judges presumed that such rules were valid and students had the burden of proving their unreasonableness. As a result, even if judges believed that school policies were unwise, they would not be struck down unless there was no rational connection between the rules and some educational purpose. This changed dramatically in 1969 when the Supreme Court handed down its landmark decision in *Tinker v. Des Moines*.[2]

Expanding Student Rights

Tinker involved a group of students who were suspended for wearing black armbands to school as a form of protest against the war in Vietnam. The principals in Des Moines had prohibited all armbands because they feared that protests about the controversial war would lead to disruption. The students maintained that the anti-armband rule violated their First Amendment rights. The Supreme Court agreed with the students.

The Court held that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[4] In support of its ruling, the Court noted that since schools "are educating the young for citizenship," they should scrupulously protect the constitutional freedoms of students "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[5]

After reviewing the facts of the case, the Court found "no evidence whatsoever" that wearing armbands interfered with the school's work or the rights of others even though administrators might have honestly feared that the armbands would lead to a disturbance. "[I]n our system," wrote the Court, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[6]

The Justices recognized that free speech in school may be risky. But, according to the Court, "our Constitution says we must take this risk," for "it is this sort of hazardous freedom— this kind of openness—that is the basis of our national strength"[7] and independence. Therefore, the Court declared that school officials cannot prohibit a particular student opinion merely "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[8] These principles are not confined to the classroom; they apply equally in the cafeteria, on the playing field, and in other school activities.

Limiting Student Expression

Freedom of expression, like all constitutional liberties, is not absolute. In *Tinker*, the Court explained that schools can limit student expression if it "materially disrupts class work or involves substantial disorder or invasion of the rights of others."[9] Further, *Tinker* does not require school officials to wait until disruption takes place. Rather, educators can restrict expression when there is significant evidence that leads them "to forecast substantial disruption."[10] In subsequent cases, the justices placed additional limitations on student expression.

The Court's ruling in *Bethel School District No. 403 v. Fraser* held that educators have broad authority to punish students for using offensively lewd and indecent speech in school-sponsored educational activities. The case arose in Bethel, Washington, when a high school senior, Matthew Fraser, delivered a nominating speech at a school assembly that referred to his candidate by using "an elaborate, graphic, and explicit sexual metaphor."[11] The Court decided that such a speech could be punished even if it was not legally obscene and did not cause substantial disruption. The Court also found that educators have discretion to determine what speech is vulgar and offensive. Subsequently, recent decisions by the federal courts have held that schools can prohibit students from using obscene language even if it does not occur in an educational activity.[12]

Student Publications

The extent to which schools can control student publications depends on whether they are part of the curriculum. If they are, educators can control their content and style. However, underground publications that are written and published off-campus are protected according to the principles of *Tinker*. The Supreme Court case that clarified this distinction was *Hazelwood v. Kuhlmeier*.[13]

The case arose in Missouri's Hazelwood High School when the principal deleted two stories he felt were inappropriate from a school newspaper that was published as part of a journalism course. One article dealt with students and pregnancy while the other concerned pupils and the divorces of their parents. The Court ruled that educators can regulate the contents of school-sponsored publications or plays even if they are not lewd and do not cause disruption. The Court reasoned that the school, as publisher of a newspaper or producer of a play, may refuse to lend its name and resources to student expression that does not meet its standards. Thus, educators have broad discretion to prohibit articles that are "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."[14] In addition, schools may refuse to sponsor student expression that advocates drug or alcohol use, irresponsible sex, or a controversial political position. Thus, in most states, educators may control the style and content of "school-sponsored expressive activities."[15]

Administrative control, however, is not unlimited. According to the Supreme Court, school censorship would be unconstitutional if it lacks a valid educational purpose or is unreasonable. For example, the Supreme Court of New Jersey ruled in favor of a junior high school student who protested the censorship of

two movie reviews that he wrote about R-rated films even though the articles did not contain anything that was vulgar or offensive. Despite a lack of supporting evidence, school administrators claimed that R-rated movies posed a danger to student health. Insofar as the educators had no evidence to support their claims and since the censorship had nothing to do with the style or content of the reviews and was limited to concerns over their subject matter, the court ruled that the school violated the First Amendment rights of the student.[16]

Hazelwood is inapplicable to "underground" publications that are not school sponsored. Educators cannot censor "underground" publications unless they cause substantial disruption, interfere with the rights of others, promote illegal activity, are libelous, or are legally obscene. Libel is a false written statement that injures a person's reputation. Moreover, if a person is a "public figure," the person must prove that the writer knew or should have known that the statement was not true. To be legally obscene, a student publication must violate three tests: first, it must appeal to the lustful interest of minors; second, it must describe sexual conduct in a way that is patently offensive to community standards; and, third, taken as a whole, it must lack serious, literary, artistic, political, or scientific value.[17]

Insofar as the *Tinker* principles apply to underground papers, they cannot be banned for expressing unpopular views or for criticizing school policies or officials. However, schools can control the distribution of underground publications.

Distribution Policies

Schools can enforce reasonable viewpoint-neutral regulations concerning the time, place, and manner in which students distribute newspapers or other material. Thus, in Colorado, a federal trial court's decision upheld a school's ban on distribution in hallways since its purpose was to maintain order, was not based on the viewpoint of the publication, and allowed copies to be handed out in other school locations.[18]

At the same time, schools cannot prohibit students from distributing materials because they deal with controversial subjects such as politics or religion or if other pupils would think that they are school-sponsored. Accordingly, the Seventh Circuit struck down a policy that prohibited distribution of religious material that students might believe was endorsed by the school. The court ruled that schools could not discriminate against religious speech and that pupils may hand out literature even if other students misunderstand its origins. "Schools," wrote the judge, "may explain that they do not endorse speech by permitting it."[19]

Courts are in conflict about school policies that require administrative approval

before distribution. In a case from Washington, for example, the Ninth Circuit held that a school's prior approval policy was unconstitutional. It commented that "student distribution of non-school-sponsored material under the Supreme Court's decisions in *Tinker* and *Hazelwood* cannot be subjected to regulation on the basis of undifferentiated fears of possible disturbances or embarrassment."[20] Most courts, have ruled that a school policy is "not unconstitutional merely because it asserts a right of prior review,"[21] since guidelines clearly can prohibit distribution of student material that is libelous, disruptive, or pervasively indecent or vulgar.

Some courts that do not object to prior review in principle have struck down specific prior review policies because they lacked either clear standards or due process safeguards. In a Maryland case, for example, the court ruled that prior review policies must prevent educators from judging material "on an ad hoc and subjective basis" and therefore "must contain narrow, objective and reasonable standards."[22] In another dispute, the Fifth Circuit held that any prior review policy must have due process safeguards, including a brief time during which the administration can review the material, a reasonable method for appeal, and a brief time for deciding the appeal.[23] Conversely, the Seventh Circuit upheld an elementary school's prior review policy even though it contained no procedural safeguards and no time limit within which a decision had to be made.[24]

Dress and Grooming Codes

Courts tend to view dress and grooming codes differently. About half of the federal appeals courts view student grooming as a constitutional right. Yet, none view dress as a right. Therefore, all courts recognize the authority of schools to establish reasonable policies regulating student clothing. This section begins by explaining the conflicting arguments used by courts to uphold or strike down school grooming restrictions under the Constitution. Next, it outlines recent arguments under state law. Finally, the chapter discusses the different ways courts rule on school dress codes.

Grooming as a Constitutional Right

Courts have used a variety of legal, educational, and philosophic arguments to uphold the rights of students who challenged school grooming codes that prohibited boys from wearing long hair. Here are three different perspectives:

1. Long hair is a form of symbolic speech protected by the First Amendment.

"Forced hair style," wrote a judge, "humiliates the unwilling complier, forces him to submerge his individuality," and exalts "organization over member, unit over component, and state over individual."[25]

2. Hair length is a personal liberty, protected by the Fourteenth Amendment. According to the First Circuit, there is no reason why decency, decorum, or good conduct requires boys to wear short hair. Nor, concluded the court, does "compelled conformity to conventional standards of appearance seem a justifiable part of the educational process."[26]
3. Rules that require boys, but not girls, to wear short hair violate the Equal Protection Clause. The argument that long hair can cause problems in the gym, swimming pool, or laboratories is simply an irrational justification for gender discrimination since girls engage in the same activities without causing health or safety problems.

Grooming Not a Protected Right

About half of the federal courts support the authority of the public schools to regulate the length of students' hair. These courts reject the notion that hair length is a constitutional right for three reasons. First, these courts maintain that since some students do not wear long hair as a form of symbolic speech, it would be inappropriate and unworkable to have the Constitution protect a pupil who intends to convey a message by wearing long hair but not other students. Second, they reason that even if grooming is a personal liberty, it is not an important liberty interest like freedom of speech or religion. Further, school grooming restrictions are temporary and relatively inconsequential. As such, these courts state that because administrators must make innumerable decisions each day which restrict student liberty, including the regulation of parking, eating, and attendance, pupils should not be able to take administrators to court every time they make such a determination. Third, since courts are overcrowded, it is impossible to protect all citizens against all minor restrictions on their liberty. These courts have concluded that since these cases do not concern issues of fundamental importance, school grooming policies should be presumed valid and not subject to litigation.

Conflict and Clarity

When federal appeals courts differ in their interpretation of the Constitution, the Supreme Court usually reviews the question and establishes a "uniform law

of the land." Yet, despite the differences among federal courts concerning student grooming, the Supreme Court has repeatedly declined to consider the issue because most justices do not believe it is an important constitutional question. Since most federal appeals courts have ruled on student grooming, it is possible to know whether grooming is a constitutional right in a given state by consulting the map at the end of this chapter.

Grooming and State Law

During the 1970s and 1980s, the federal courts clarified their views about grooming rights under the Constitution. Nevertheless, students who live in states where the federal courts ruled that grooming was not a constitutional right can still challenge school grooming restrictions under state law, especially under state Equal Rights Amendments or anti-discrimination statutes.

Recently, for example, an appellate court in Texas ruled in favor of an elementary student who was transferred to in-school suspension for four months for wearing a ponytail below his collar. The school argued that its hair policy prevented gang activity, instilled gender identity and community values, and maintained discipline. The court held that the evidence did not support the argument advanced by the educators, as it found no connection between hair style and gang activity, that the many schools without hair length rules have no greater discipline problems than those that do, and that the policy simply teaches a mindless conformity in conflict with the state's anti-discrimination law. The court concluded that the four-month in-school suspension was "tantamount to solitary confinement,"[27] unreasonable and unconscionable.

The Supreme Court of Texas reversed the appeals court decision and ruled that the state's anti-discrimination statute does not prohibit dress and grooming codes that differentiate between males and females and that the hair length rule "does not deprive male students of an equal opportunity to receive an education."[28] Consequently, state courts are as likely as their federal counterparts to differ about whether school hair length restrictions violate state law.

Distinguishing Clothing and Grooming

Courts that do not protect a student's hair style will probably not protect clothing. But, courts that do protect hair style may not protect student clothing, since some judges believe that hair restrictions are more serious invasions of personal

freedom. Perhaps this distinction is based on the notion that hair style is more fundamental to personal appearance, does not usually involve issues of morality, and hair length restrictions usually have a long-term effect. Further, even courts that protect both clothing and grooming give schools much wider discretion to regulate the former in the interests of health, safety, order, or discipline.

School Dress Codes

All courts recognize that while school officials have authority to regulate student clothing, not all dress codes are constitutional. In New Hampshire, for example, the federal trial court held that a rule against wearing jeans was unconstitutional. The court rejected the argument that wearing jeans "detracts from discipline and a proper educational climate" because the school presented no evidence to support its position.[29] Similarly, courts in New York[30] and Idaho[31] annulled rules prohibiting girls from wearing slacks because the prohibitions were discriminatory, arbitrary, and did not have a reasonable relationship to the educational process. However, as one judge noted, a school "can and must... exclude persons who are unsanitary, obscenely or scantily clad."[32] And, all courts will uphold dress codes that promote safety, especially in gym and shop classes. Current controversies involve students who wear gang symbols, ethnic clothing, controversial T-shirts, and boys who wear earrings.

Gang Emblems

Courts generally uphold bans on clothing, jewelry, and other symbols that promote gang activity. Yet, some courts have ruled that schools must do more than just assert that their clothing restrictions are intended to prevent gang activity. When clothing restrictions are challenged, administrators must present some evidence to justify their policies. In California, for example, a school district prohibited all students from wearing clothing identified with a college or professional sports team because administrators argued that gang activity was associated with such clothing. Conversely, a federal court struck down the prohibition's application to elementary and middle school students since the educators did not present any evidence that the clothing would cause disruption and, in the elementary schools, there was no evidence of any gang presence.[33]

Earrings

During the 1990s, schools used a variety of justifications to try to prohibit increasing numbers of young men from wearing earrings. A split decision by an appellate court in Indiana illustrates the conflicting arguments surrounding such prohibitions. The school argued that the ban prevents injuries in gym by rough-housing boys, discourages identification with drug use and homosexuality, prevents gang and cult symbols, promotes academic achievement, and discourages rebellion against community standards. The majority rejected the argument that there was a correlation between earrings and cults, gangs, or homosexuality since it was unsupported by any evidence. The judges also rebuffed the safety argument because girls wore earrings without injury. Although a dissenting judge maintained that there was no evidence to support any of the school's other arguments, the majority upheld the rule since some testimony showed that a strict dress code improves student's attitudes, instills discipline, and is not discriminatory if it "prohibits all students from wearing jewelry inconsistent with community standards, without respect for gender."[34]

Ethnic Clothing

According to the federal trial court in New Mexico, some ethnic clothing might be protected as non-verbal conduct if it meets a two-part test: first, if there is an intention "to convey a particular message" and second, if there is "a great likelihood that the message would be understood by observers."[35] This test was used in the case of a high school student who was suspended for violating the school's ban on wearing sagging pants. The school said that such pants were associated with street gangs. But, the student was not a gang member. Moreover, he argued that the ban restricted his freedom of expression since he wore sagging pants in the "hip hop" style as a statement of his identity as a black youth. The judge ruled that the student met the first test by showing that sagging pants were intended "to express his link with his black identity." The student lost his case since he did not meet the second test insofar as he failed to show that the pants conveyed "an objectively recognizable message" to observers.

Controversial T-Shirts

Most courts hold that schools may ban clothing that has sexual, vulgar, or lewd messages, but not items that express controversial ideas. In Virginia, for

example, a student was suspended for wearing a shirt with the words "Drugs Suck!" The student said she simply wanted to share the message that "drugs are bad." The court supported the administration and agreed that the word "suck" could have offensive, sexual connotations.[36] Similarly, in Massachusetts, the federal court upheld a policy prohibiting clothing that is "obscene, profane, vulgar, or lewd." Under this policy, two students were prohibited from wearing T-shirts that said "Co-ed Naked Band: Do It To The Rhythm" and "See Dick Drink. See Dick Drive. See Dick Die. Don't Be a Dick."[37] The court applied the principles of *Fraser* to conclude that schools can prohibit clothing with "vulgar" speech and "sexual innuendo" even if the message does not cause disruption.

On the other hand, the administrators in Massachusetts permitted the students to wear one shirt depicting a marijuana leaf and the words "Legalize It" and another with "Co-ed Naked Gerbils: Some People Will Censor Anything" because the shirts contained political messages and did not cause disruption. Further, the court struck down the part of the dress code that banned clothing that "harasses, threatens, intimidates, or demeans" certain groups. The First Amendment, declared the court, "does not permit official repression... of even odious ideas" and even when these ideas "may result in hurt feelings or a sense of being harassed."[38] According to the court, educators may teach tolerance and respect, but may not "demand that students express agreement" with their values. Therefore, wrote the judge, schools cannot silence non-vulgar, non-disruptive speech simply based on the viewpoint expressed. It is not clear, however, whether other courts will agree with this strong defense of offensive student expression in public schools.[39]

Implications for Administrators

Federal and state courts have handed down a series of decisions that should govern administrators as they develop and implement policies concerning student expression, dress, and grooming. The following principles summarize those decisions.

Students' Personal Views

Students do not lose their First Amendment right to freedom of expression in the public schools. This means that teachers and administrators cannot prohibit students from

expressing personal opinions simply because they are controversial or unpopular.

Schools may prohibit and punish student expression that is libelous, obscene, causes substantial disruption or interferes with the rights of others.

Student views cannot be banned simply because of an administrator's apprehension of a disturbance. Speech restrictions must be based on facts, not just fears. However, administrators may act before a disorder takes place. Thus, educators can restrict student expression when they have reliable evidence that leads them to forecast substantial disruption.

Schools may prohibit "offensively lewd and indecent speech" even if it is not legally obscene and does not cause substantial disorder.

School-Sponsored Publications

Educators can control the content and style of school-sponsored publications and performances. School censorship, however, is not constitutional if it is unreasonable or has no valid educational purpose.

Underground Publications

Administrators cannot censor student underground publications that are not sponsored by the school. Such publications may promote unpopular views and criticize school policies and personnel. Underground publications can be banned if they are libelous or legally obscene or if they cause substantial disruption or interfere with the rights of others.

Distribution

Schools can restrict the time, place, and manner in which students distribute publications. Any restrictions must be reasonable, viewpoint-neutral, and cannot prohibit the distribution of student-sponsored materials on controversial topics such as politics or religion.

Prior Review

Courts are in conflict about policies requiring administrative approval before students can distribute non-school-related materials. Most courts require policies requiring prior review to have clear, objective standards and due process safe-

guards. One federal court even held that prior approval policies are unconstitutional. In contrast, another federal court recently upheld a prior review policy with no procedural safeguards.

Grooming and the Constitution

About half of the federal appeals courts have ruled that student grooming is protected by the Constitution. In these jurisdictions, schools cannot restrict student hair style except for reasons of health, safety, or disruption.

The other federal courts do not believe that the Constitution protects grooming. In these jurisdictions, school grooming policies are presumed to be constitutional and will be upheld by the courts unless students can prove that they are unreasonable.

How the federal courts have ruled on student grooming policies is illustrated by the map at the end of this chapter.

Grooming and State Law

Even where the federal courts refuse to consider grooming policies that restrict male hair styles, such rules can be challenged under state laws, especially Equal Rights Amendments or anti-discrimination statutes. In view of the conflicting judicial opinions concerning student grooming, it is important for administrators to check the law in their jurisdiction.

Dress Codes

Schools have authority to establish reasonable policies regulating student dress, especially for reasons of health, distraction, and safety. Thus, courts have upheld specific bans on jewelry or clothing clearly associated with gang activity or criminal behavior even if the restrictions only applied to boys. Similarly, schools may ban T-shirts and other clothing with messages that are lewd and vulgar or promote illegal or unsafe products or activities. Yet, courts have struck down arbitrary or unreasonable dress codes where there is no clear relationship between the rules and school discipline or other legitimate educational purposes. In addition, school officials cannot prohibit clothing with controversial messages if they are neither disruptive nor vulgar.

Conclusion

This chapter has outlined the scope and limits of administrative authority in the areas of student expression, grooming and dress. Federal court decisions in the 1990s have tended to curtail the rights of students that judges expanded during the 1970s. Yet, it is important for school officials to make a clear distinction between what they have legal power to do from what is wise to do. Most courts, for example, allow schools to impose strict, restrictive, dress codes on students and allow administrators to censor all school-sponsored publications. But, whether school officials should use their legal authority to impose rigid dress codes or censor student writing depends on whether censorship and strict codes are the best means to promote student learning and self-discipline. These questions must finally be resolved, not by judges in federal or state courts, but by thoughtful educators in our nation's schools.

Notes

1 Material in this chapter is based on Chapters 9 and 19 of L. Fischer, D. Schimmel, and C. Kelly, *Teachers and the Law*, (5th ed. 1999).

2 393 U.S. 503 (1969).

3 *Id.* at 506.

4 *Id.* at 507.

5 *Id.*

6 *Id.* at 508.

7 *Id.* at 508-509.

8 *Id.* at 509.

9 *Id.* at 513.

10 *Id.* at 514.

11 478 U.S. 675, 678 (1986).

12 *Heller v. Hodgin*, 928 F. Supp. 789 (S.D. Ind. 1996).

13 484 U.S. 260 (1988).

14 *Id.* at 271.

15 However, in a few states such as California, Colorado, and Massachusetts, laws were passed after Hazelwood to protect student freedom of expression even in school-sponsored publications. Although states can never give students less rights than the Supreme Court requires, they can always give students more.

16 *Desilets v. Clearview Regional Bd. of Educ.*, 647 A.2d 150 (N.J. 1994).

17 *Miller v. California*, 413 U.S. 15 (1973).

18 *Hemry by Hemry v. School Bd. of Colorado Springs*, 760 F. Supp. 856 (D. Colo. 1991).

19 *Hedges v. Wauconda Community Sch. Dist. No. 119*, 9 F.3d 1295 (7th Cir. 1993).

20 *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988).

21 *Bystrom v. Fidley High Sch. Indep. Sch. Dist.* 14, 822 F.2d 747, 750 (8th Cir. 1987).

22 *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973).

23 *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972).

24 *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996).

25 *Karr v. Schmidt*, 460 F.2d 609, (5th Cir. 1972) (Wisdom, J., dissenting).

26 *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970).

27 *Bastrop Board of Trustees v. Towngate*, 922 S.W.2d 650, 654 (Tex. Ct. App. 1996).

28 958 S.W. 2d 365 (Tex. 1997).

29 *Bannister v. Paradis*, 316 F. Supp. 185 (D.N.H. 1970).

30 *Scott v. Board of Educ., Hicksville*, 305 N.Y.S.2d 601 (N.Y. Sup. Ct. 1969).

31 *Johnson v. Joint Sch. Dist. No. 60*, Bingham County, 508 P.2d 547 (Idaho 1973).

32 *Bannister, supra* note 29 at 188-189.

33 *Jeglin v. Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459 (C.D. Cal. 1993).

34 *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330, 336 (Ind. Ct. App. 1995).

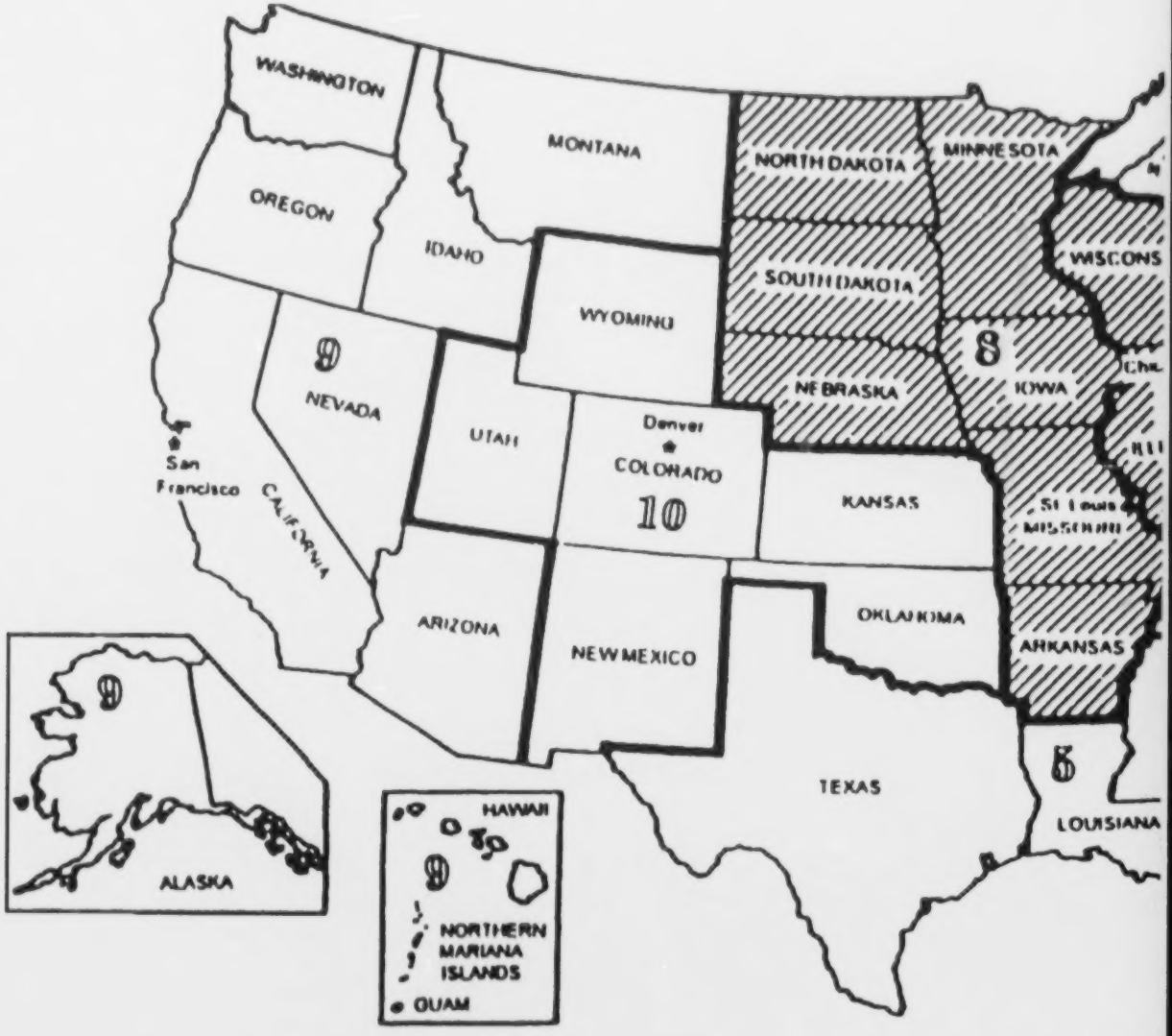
35 *Bivens by Green v. Albuquerque Pub. Schs.*, 899 F. Supp. 556, 560 (D.N.M. 1995).

36 *Broussard by Lord v. School Bd. of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992).

37 *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157 (D. Mass. 1994).

38 *Id.* at 159

39 The Supreme Judicial Court of Massachusetts later ruled that, under the state's Student Free Expression Law, students are allowed to wear the Co-ed Naked T-shirts since vulgar and suggestive messages are protected if they are not legally obscene or libelous and cause no disruption. *Pyle v. South Hadley Sch. Comm.*, 667 N.E.2d 869 (Mass. 1996).



BEST COPY AVAILABLE

APPENDIX

to Chapter Twelve

Circuit Court Rulings On Grooming

☐ **School Restrictions Upheld**

Third Circuit**	Ninth Circuit
Fifth Circuit	Tenth Circuit
Sixth Circuit	Eleventh Circuit

D.C. Circuit†

▨ **Grooming as Constitutional Right**

First Circuit	Seventh Circuit
Second Circuit*	Eighth Circuit
Fourth Circuit	

*Probable.
**Probable.
†Probable.

BEST COPY AVAILABLE

CHAPTER THIRTEEN

The Fourth Amendment and the Quest for Drug and Weapon Free Schools

■ by Jacqueline A. Stefkovich & G. Michaele O'Brien [1]

During the past decade, much of public discourse over the state of the schools has focused on concerns over safety and violence. With schools commonly viewed as microcosms of society, educational leaders must be increasingly sensitive to issues of security. As a result, administrators are changing the ways in which they attempt to maintain order and discipline in the schools. Much of this change has resulted in a new look at the Fourth Amendment which protects students from illegal searches and seizures. This chapter addresses these concerns by providing an overview of legal aspects related to school searches as well as an analysis of implications related to policy and practice.

The Fourth Amendment and School Searches

The Fourth Amendment to the United States Constitution guarantees that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[2]

Certainly, this amendment challenges school officials to safeguard the constitutional rights of students when creating or instituting policies on searches. At the same time, there can be no question that every administrator must be attentive to

issues of both drugs and weapons in school settings. A common concern with school safety leads administrators to institute methods of discipline and prevention that involve searching students' persons or property. It is, therefore, important for educational leaders to maintain drug and weapon free buildings with an awareness and knowledge of the law surrounding the constitutional rights of students.

Traditionally, administrators have followed disciplinary codes which relied on suspension or expulsion of students who violated more serious school rules. Although these measures have remained largely unchanged, the methods relied upon by educational leaders to diagnose infractions of school rules have begun to evolve. More precisely, administrators have started combining a method of discipline for drug and weapon possession based on individualized suspicion that a school rule has been violated with one which attempts preventive measures applied to students at large. This means that in addition to searching an individual student's person or possessions, mass searches which rely on methods such as drug testing or metal detectors appear to be more widely accepted. Moreover, school districts are more inclined than ever to employ their own police forces or to involve local and/or state police in their searches.[3]

Clearly, educational leaders must examine the legality of search or disciplinary policies before implementing them. Indeed, there are many legal implications for officials who choose to use both reactive and pro-active methods of searching students for violations of school rules. Even while recognizing that each incident an administrator faces must be evaluated individually, several cases can be informative when dealing with student searches. Opinions of the Supreme Court are particularly important in this regard since they are legally binding on school districts throughout the United States.

Supreme Court Decisions

Educational leaders should be especially knowledgeable about two Supreme Court cases interpreting Fourth Amendment guarantees in public schools, *New Jersey v. T.L.O.*[4] and *Vernonia School District 47 J v. Acton.*[5] In *T.L.O.*, the Court articulated the standards for searching students while in *Vernonia* it addressed drug testing. These two decisions, in addition to lower court cases involving metal detectors, police involvement in searches, strip searches, and other searches of students' persons or property combine to establish a body of case law that school officials should consider when crafting policy.

T.L.O. involved the search of a Piscataway, New Jersey, high school student's

handbag by an assistant principal after a teacher suspected her of violating school rules by smoking cigarettes in a lavatory. The student was summoned to the assistant principal's office, at which time her handbag was searched for cigarettes. During the search, the administrator found a pack of rolling papers. Suspecting drug use, he delved further into the student's bag where he uncovered marijuana and various evidence suggesting she sold drugs. The student claimed that this search violated her Fourth Amendment rights and should not have been admissible in any juvenile delinquency proceedings.

In *T.L.O.*, the Supreme Court analyzed the method and reason for the search of the student's bag and determined that it was legal. In doing so, the Court recognized that the rights of students need to be balanced with the responsibility of educators to maintain order and discipline in the schools. Aware of the need for balance, the Court developed a standard for searching students which is the most significant part of its decision for administrators. Based on *T.L.O.*, an educator must have reasonable suspicion that a school rule has been violated before instituting a search. There are two factors the Court used when considering the reasonableness of a search. First, at its inception, there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating the law or rules of the school."[6] Second, the search must be reasonably related in scope to the circumstances that prompted the investigation. This means that the area searched must be reasonably related to the offense and appropriate to the age and gender of the student.

New Jersey v. T.L.O. is significant, but limited, since it involves the search of an individual student's property. The Court did not address individualized suspicion, the legality of more intrusive actions such as strip searches, or mass searches using metal detectors or drug tests. Further, the Court stated explicitly that it would not address the standard needed by police who conduct searches in public schools.

It was not until ten years after *T.L.O.* that the Supreme Court revisited the Fourth Amendment rights of students and, when it did, it considered the implications of mass and suspicionless searches. The question of individualized suspicion left unanswered by the Court in *T.L.O.* was addressed in *Vernonia School District 47 J v. Acton*. *Vernonia* involved a seventh grade student who was suspended from interscholastic athletics because he and his parents refused to sign a consent form allowing him to be tested for drug use as required under the district's Student Athlete Drug Policy. The student and his parents challenged his suspension and claimed that his rights under the Fourth Amendment and the state constitution were violated by the policy since there was no reason to believe that he ever used drugs.

In response to the perception of increased drug use on campus, the Vernonia School Board created a policy which required all students trying out for interscholastic athletic teams to submit to a urinalysis drug test. As part of the policy, student athletes were tested individually at the beginning of each season and randomly throughout the season. In order to safeguard the privacy rights of students, explicit procedures were set in place. Students who tested positive were required to undergo a second examination. Those who tested positive on a second test were suspended from the team and sent for counseling. Subsequent violations led to mandatory suspensions from athletics.

The Supreme Court upheld the constitutionality of the policy. In doing so, the Court applied a balancing test to determine the reasonableness of the search. Much like the test it uses in cases dealing with federal employees,[7] the Court considered the intrusiveness of a search against the government's interest in promoting such an action.

In developing this test, the Court applied three criteria. First, it found that students have a lesser expectation of privacy than ordinary citizens. In fact, it reasoned that student athletes in particular, experience diminished privacy for example, because they are subject to physical examinations before becoming eligible to play and dress in open areas of locker rooms. Second, the Court decided the urinalysis was minimally intrusive since it was coupled with safeguards that allowed little encroachment on students' privacy. Finally, given the perception of increased drug use, the Court maintained that there was a significant need for the policy. However, a caution is in order since *Vernonia* applies only to drug testing of student athletes. It remains unclear whether drug testing of any other groups would pass constitutional muster.[8]

Lower Court Decisions

Insofar as *T.L.O.* and *Vernonia* are Supreme Court decisions, their implications should be well understood by any administrator responsible for crafting policies concerning searches of students or their belongings. Yet, while these cases should be used to inform practice, they do not address the legality of every Fourth Amendment issue faced by administrators. As such, several lower court actions involved other types of searches important to school officials who are developing search policies. Even though these cases are binding only for schools located in the same state or federal jurisdiction, they may lend guidance in the absence of controlling precedent.

Highly Intrusive Searches

Although the Supreme Court did not specifically rule on highly intrusive actions such as strip searches, consideration of the reasonable suspicion standard inevitably arises when the courts are forced to consider actions of this type. As such, *Williams by Williams v. Ellington*,[9] *Cornfield by Lewis v. Consolidated High School District No. 230*,[10] *State of West Virginia ex rel. Galford v. Mark Anthony B.*,[11] and *Jenkins by Hall v. Talladega City Board of Education*[12] are four recent strip search cases worth considering. Keeping in mind that school officials should consult their school policies and/or school attorney as to the legality of such searches in their school or jurisdiction.

Williams addressed strip searching where there was a considerable amount of evidence that a high school student possessed illegal substances. After checks of both her locker and handbag proved unsuccessful, the student was searched by a female school official. As per district policy, which required reasonable suspicion, the assistant principal asked the student to remove her T-shirt and pull down her jeans. The Sixth Circuit ruled that the nature of the policy, combined with the evidence collected against the student, and the size of the package being sought, led to the legality of the search. In particular, the court observed that the explicit policy protected the district from liability. The policy read:

> A pupil's person will not be searched unless there is a reasonable suspicion that the pupil is concealing evidence of an illegal act... When a pupil's person is searched, the person conducting the search shall be the same sex as the pupil; and a witness of the same sex shall be present during the search... [13]

Williams was the first case in which a court upheld such a highly intrusive search. The court reasoned that the search was proper because it had been conducted in accordance with a strict policy which was crafted with attention to *T.L.O.* Further, the fact that there was no implication of past misapplication of the policy aided the district's claim.

A particularly noteworthy case is *Cornfield* wherein a student was subjected to a total nude search because school officials believed that he was "crotching," or hiding, drugs in his pants. Ruling in favor of the school district, the Seventh Circuit held that the search was reasonable since educators relied on a number of incidents, and observations, reported by several different persons. The court

found that these factors created a cumulative effect that was sufficient to create a reasonable suspicion that the student was crotching drugs. In addition, the court determined that under the circumstances, a pat down would have been more intrusive than the strip search which took place in the privacy of a gym locker room with school officials of the same gender standing at a distance.

One guideline for conducting searches is that the more intrusive the search, the greater the need for its justification. Thus, while strip searches are sometimes justified for drugs or weapons, they may not be acceptable for a violation of minor school infractions. In addition, strip searches for money or property have not generally been upheld. For example, in *State v. Mark Anthony B.*, the Supreme Court of Appeals of West Virginia found the strip search of an eighth grader for $100 was unreasonable because it was excessively intrusive. The court considered that such a search might be considered reasonable if it was undertaken for drugs or weapons. However, since missing or stolen money did not pose any type of immediate threat or exigency, the court concluded that the search was illegal.

Conversely, in *Jenkins v. Talladega*,[14] the Eleventh Circuit declined to rule on the constitutionality of a strip search for money but maintained that theft could be considered a serious offense. The case involved the strip searches of two eight-year-old second graders at an elementary school in Talladega, Alabama, after a student reported that seven dollars was missing from her purse. Another student told the teacher that one of the two pupils who was searched had taken the money and put it in the other's backpack. After the teacher searched the backpack and found nothing in it, she called the students into the hallway where the two girls accused each other and a classmate. At this time, another teacher came by, was informed of the accusation, and took charge of the investigation. The second teacher ordered the students to take off their shoes and socks. No money was found.

The second teacher called in the school's guidance counselor who also accompanied the girls to the restroom for yet another search. It was here that the girls were told to go into the stalls and come out with their underpants down to their ankles. Again, no money was found. The students were then sent to the principal's office. The record indicates that the students claimed that the educators later subjected them to a second strip search in the girls' room where they were asked to take off their dresses; school personnel denied this accusation.

While the court did not determine whether the search violated the constitutional rights of the students, it did hold that the educators who conducted the search were not liable under section 1983 of the United States Code. This statute

provides qualified immunity which "protects government officials performing discretionary functions from civil trials... and from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[15] The court reasoned that there was no basis for liability since there was no precedent related to strip searching in schools in either Alabama or in the Eleventh Circuit and the Supreme Court had not ruled on this matter.

It should be noted that decisions upholding strip searches are the exception rather than the rule. Indeed, seven states, California, Iowa, New Jersey, Oklahoma, South Carolina, Wisconsin, and Washington have passed laws that forbid strip searching of public school students.[16] Moreover, while school officials are generally not liable for money damages after an illegal search, they could be held accountable if they blatantly disregard the rights of students. The results of this kind of action are usually in the form of high out-of-court settlement costs for school districts.[17]

The search of a student's handbag in *T.L.O.* and the strip searches in *Williams*, *Cornfield*, *Mark Anthony B.* and *Talladega* were conducted based on the reasonable belief that specific school rules had been violated. Consequently, other opinions are needed to help define the legality of mass searches which may be the result of a pro-active approach by administrators seeking to create drug and weapon free schools.

Metal Detector Searches of Public School Students

Insofar as metal detectors are becoming common fixtures in the schools, it is not surprising that they have been the subject of litigation. In the first recorded case in point, *People v. Dukes*,[18] a court in New York held that a school's use of metal detectors was constitutional.

As part of a routine search at Washington Irving High School in New York City, a Special Police Officer searched a student's book bag with a hand held metal detector. During the search, the officer discovered a manila folder which contained a knife. The student, who was subsequently charged with criminal possession of a weapon, moved to have the evidence suppressed by claiming that the search violated her Fourth Amendment rights. In its analysis, the court compared the search of high school students to one of people at an airport[19] or courthouse.[20] Rather than use the reasonableness standard set forth in *T.L.O.*, the court applied the doctrine of an administrative search, under which a search is minimally intrusive and administrative if it is meant to inhibit a dangerous event.

Further, in an administrative search, individualized suspicion is not necessary.

As in *Vernonia*,[21] the *Dukes* court considered the merits of a highly detailed policy. In fact, the explicit and thoughtful metal detector policy of the district was a key factor for the court in considering its constitutionality. In addition, like the drug testing program in *Vernonia*, the metal detector search in *Dukes* was neither part of a criminal investigation nor aimed at a group.[22] The school officials believed that the legitimate threat of harm required such searches. Along with *Vernonia*, *Dukes* shows how the courts have applied a standard that varies from reasonable suspicion when large groups are searched because a strong element of danger is present.

In a second case involving metal detectors, *People v. Pruitt*,[23] an appellate court in Illinois ruled that their random use by school officials in Chicago was constitutional. In *Pruitt*, a student was found in possession of a .38 caliber revolver after he passed through a metal detector as he entered school. The court held that the school did not need individualized suspicion to conduct a search of this nature.[24] As in *Vernonia*, the court concluded that the school system's need to maintain order was primary and adequate to maintain the standard of reasonable suspicion.

Police Involvement in School Searches

In light of the great concern about violence in schools coupled with the recognition that weapons and drug possession usually violate state or even possibly federal laws, administrators seem more inclined than ever to call in police officers to assist with searches. One common type of search involves the use of canines to sniff out drugs. In *Horton v. Goose Creek Independent School District*,[25] the Fifth Circuit held that a general search of individual students by a trained sniff dog was illegal. The court decided that the need to reduce drugs on campus was not compelling enough to justify such a search because it was so intrusive since the dogs actually touched the students. Accordingly, the court stated that individualized suspicion was required. The court added that canine sniffing of inanimate objects such as lockers is legal as this does not constitute a search under the Fourth Amendment.[26]

As to other types of searches involving the police, school officials should keep in mind that the Fourth Amendment requires police officers to have probable cause to conduct a search of an individual's person or property based on their belief that the search will result in evidence of criminal activity.[27] This is a much stricter standard than that of reasonable suspicion which is applied when school

officials conduct searches. Thus, it is much easier for an administrator to search students than for a police officer to do so. While the law is not clear concerning the standard needed for joint searches conducted by police and administrators, the general rule of thumb is that if school officials initiate the search, then reasonable suspicion applies even if the police assist.[28]

Implications for School Officials

In light of the diversity in facts surrounding case law, judicial opinions on search and seizure leave educators with a great deal of discretion when seeking to implement programs and policies aimed at achieving drug and weapon free schools.[29] In spite of the lack of any blueprint offered to school officials by the courts, there are many implications for policy and practice that arise from such cases.

Implementation of Search Policies and Practices

If a school system is considering the adoption of a policy dealing with searches, there are several steps that educators should consider before attempting to search students. When creating policies that deal with intrusive searches, like strip searches, administrators should include ways of emphasizing less intrusive searches, such as locker searches; asking consent of students; having witnesses present at each search; requiring the person(s) conducting the search be of the same gender as the student being searched; including guidelines and search strategies in the policy which limit the amount of discretion afforded school personnel; providing safeguards for insuring students' privacy; giving students advance notice of searches; and clearly documenting the need for generalized preventive type searches such as drug testing and metal detector searches.

Importance of Legal Counsel

Because laws are interpreted on a case by case basis and new suits are frequently being litigated, it is critical that school officials consult legal counsel as they develop and implement policies on searches. While this chapter provides an overview of the case law on search and seizure, it is also necessary to consider statutes and lower court opinions in one's own state or federal circuit, some of which have been reviewed here. This more localized perspective is especially important in considering issues not yet addressed by the Supreme Court such as strip searches, the use of metal detectors and canines, searches involving the police, and drug testing of students regardless of whether they are athletes. In

addition, individual states have the authority to make laws which are more protective of the rights of students and may even prohibit strip searches. As such, school officials must be cognizant of statutes that may prevail in their states.

Financial Costs of Conducting Searches

Searching students may have serious financial implications that generally take two forms. The first is costs associated with implementing a program or policy. For example, the use of equipment such as metal detectors can require large expenditures on the part of the school district. A hand-held unit may cost $200 while a large standing unit may cost from $5,000 to $25,000.[30] Even drug tests can cost a school district money that adds stress to most stretched budgets. When the staff needed to monitor both metal detectors and drug testing are taken into account, the cost may be substantial. These expenditures rise considerably if schools hire their own security officers or entire school police units.

The second expense is the cost that may arise from suits challenging the legality of searches. Searches that are not properly conducted by school officials can be extremely expensive. This is not to say that school officials should be overly concerned about conducting illegal searches. When the Supreme Court first articulated the reasonable suspicion standard in *New Jersey v. T.L.O.*, the Justices wanted to make the test easy for school officials to follow. And, as commentators[31] have pointed out, school districts generally win cases challenging their use of this standard. On the other hand, overly intrusive strip searches conducted illegally may lead to large out of court settlements for students.[32]

Searching as a Last Resort

Student searches, especially mass searches involving metal detectors and drug tests or highly intrusive searches such as strip searching, should be viewed as a last resort. Under such circumstances, administrators should consider whether the need justifies the use of these search strategies and, if so, whether they have attempted to resolve drug and weapons problems through other methods such as drug education programs, alternative dispute resolution, and counseling programs and/or referrals.

Conclusion

As emphasized in this discussion, the cost of searches can be great in both dollars and morale. Therefore, any program of searching needs to be implemented

after careful analysis of both the costs and benefits. In addition, school officials must consider that even though various courts have upheld searches does not mean that schools either must or should employ these methods. Thus, school districts should decide their needs based on their own circumstances. The authors hope that this chapter offers some guidance to educators as they consider policies and practices impacting students' Fourth Amendment rights and their responsibilities in maintaining order and discipline in a time riddled with concerns about school safety.

Notes

1 The authors wish to thank Dr. John Morris, Director of Financial Aid, Temple University, for his valuable assistance related to this project.

2 U.S. Const. amend. IV

3 See e.g., J. Portner, "Cops on Campus", *Education Week*, 26-30, June 22, 1994.

4 469 U.S. 325 (1985).

5 515 U.S. 646 (1995).

6 *T.L.O., supra* note 4 at 342.

7 *See*, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

8 *See, Todd v. Rush*, 133 F.3d 984 (7th Cir. 1998) and *Miller v. Wilkes*, 1999 WL 173632 (8th Cir.)(upholding drug testing of students involved in extracurricular activities). But *see Trinidad School District No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998) (ruling that *Vernonia* does not extend to drug testing of students in extra-curricular activities) and *Joy v. Penn-Harris-Madison School Corp.*, 2000 U.S. App. LEXIS 9870 (ruling as illegal random drug testing of students in extra-curricular activities but upholding drug testing of students driving to school).

9 936 F.2d 881 (6th Cir. 1991).

10 991 F.2d 1316 (7th Cir. 1993).

11 433 S.E. 2d 41 (W. Va. 1993).

12 95 F.3d 1036 (11th Cir. 1996), vacated reh'g, en banc, 115 F.3d 821 (11th Cir. 1997).

13 936 F.2d 883 (Citing the Graves County High School Student Handbook, 1987-88, p.34).

14 *Supra* note 12.

15 42 U.S.C. § 1983, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) and *Butz v. Economou*, 438 U.S. 478, 506 (1978).

16 *See* J. A. Stefkovich, *Strip Searching After Williams: Reaction to the Concern for School Safety?* 93 *Educ. L. Rep.* 1107 (1994).

17 Stefkovich, J. A. & G. M. O'Brien, *Strip Searching in Public Schools: Beyond Reported Case Law*, 15 *Ill. Sch. L. Q.*, 142 (1995). See also, J. R. McKinney, *School District Liability for Unreasonable Searches and Seizures*, 60 *Sch. Bus. Affairs* 44.

18 580 N.Y.S.2d 850 (N.Y. City Crim. Ct. 1992).

19 *See, e.g., People v. Kuhn*, 351 N.Y.S.2d 649 (N.Y. 1973); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); *United States v. Albarado*, 495 F.2d 893 (2d Cir. 1974).

20 *See, e.g., Downing v. Kunzig*, 454 F.2d 1230 (6th Cir. 1972).

21 515 U.S. 646 (1995).

22 Stefkovich, J. A. and G. M. O'Brien, *Students' Fourth Amendment Rights and School Safety*, 29 *Education and Urban Society*, 149 (1997).

23 662 N.E.2d 540 (Ill. App. Ct. 1996).

24 Courts have consistently upheld the use of metal detectors in schools. See *People v. Latasha W.*, 70 Cal. Rptr. 2d 886 (Cal. Ct. App. 1998); In the Interest of S.S., 680 A.2d 1172 (Pa. Super. Ct., 1996); In re F.B. 726 A.2d 361(Pa. 1999) and State v. J.A., 679 So. 2d 316 (Fla. Dist. Ct. App. 1996).

25 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) S. Ct. 3536 (1983).

26 *See also Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), aff'd. 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981); *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981); and *B.C. v. Plumas Unified Sch. Dist.*, WL 729168 (9th Cir., 1999).

27 *See*, e.g., *Beck v. Ohio*, 379 U.S. 89 (1964); *Brinegar v. United States*, 338 U.S. 160 (1949).

28 *See* J. A. Stefkovich & J. A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?* 1 *BYU Educ.* & L.J. 25 (1999).

29 J. A. Stefkovich & G. M. O'Brien, *Search and Seizure What Your School's Rights Are*, 62 *Sch. Bus. Affairs* 12, 18-19 (1996).

30 M.A. Gips, "Securing the Schoolyard", *Security Management*, 47 (March 1996).

31 *See*, e.g., J. R. McKinney, *The Fourth Amendment and the Public Schools: Reasonable Suspicion in the 1990s*, 91 *Educ. L. Rep.* 455 (1994); J.M. Sanchez, *Expelling the Fourth Amendment from American Schools: Students' Rights Six Years After T.L.O.*, 21 J. L. & Educ. 381 (1992).

32 Stefkovich, J. A. and G. M. O'Brien, *supra* note 16. *See also*, Joseph R. McKinney, *supra* note 17.

AUTHORS

Robert Beebe, Ed. D. is a professor of educational leadership at Youngstown State University.

Carole W. Briggs, J.D. is a Principal in the firm of Timbers & Briggs, P.C., Glastonbury, Connecticut.

Frank Brown, Ph. D. is a Ph.D. in Policy, Planning, and Administration from the University of California at Berkeley.

Christine L. Chinni, JP is an attorney in the Labor and Employment Department of the firm of Shipman & Goodwin LLP, Hartford, Connecticut.

David L. Gregory, J.D., LLM, J.S.D. is a professor at the St. John's University School of Law in Jamaica, New York.

Richard C. Hunter, Ed.D. is a professor of education leadership at the University of North Carolina at Chapel Hill.

Anne H. Littlefield, J.D. is an attorney in the Labor and Employment Department of the firm of Shipman & Goodwin LLP, Hartford, Connecticut.

Laurie Martino, J.D. is an associate attorney with the New York City office of the national firm, Piper & Marbury.

Ralph D. Mawdsley, Ph.D., J.D. is a professor of the Department of Counseling, Administration, Supervision, and Adult Learning at Cleveland State University.

Richard A. Mills, Jr., J.D. is an attorney in the Labor and Employment Department of the firm of Shipman & Goodwin LLP, Hartford, Connecticut.

G. Michaele O'Brien is an advanced doctoral student in Educational Administration at Temple University working on a dissertation topic related to law and school safety.

Allan G. Osborne, Jr., Ed.D. is an assistant principal at Snug Harbor Community School in Quincy, Massachusetts and a visiting associate professor at Bridgewater State College, Bridgewater, Massachusetts.

Harvey B. Polansky, Ph.D. is a superintendent of schools in Southington, Connecticut.

C. Daniel Raisch, Ph.D. is an associate professor in Educational Leadership and Associate Dean of the School of Education and Allied Professors at the University of Dayton.

Charles J. Russo, J.D., Ed.D. is a professor in the Department of Educational Leadership, Adjunct Professor of Law, and Fellow in the Center for International Program at the University of Dayton.

David Schimmel, J.D. is a professor of Education at the University of Massachusetts at Amherst, and visiting professor at Harvard University's Graduate School of Education.

William Shula is an Assistant Professor in the Department of Educational Leadership at Bradley University.

Jacqueline A. Stefkovich, J.D. is a professor of School Law in the Department of Administration, Policy, Foundations, and Policy Studies, at the Pennsylvania State University.

Chuck Vergon, J.D. is an attorney and professor of educational leadership at Youngstown State University.

R. Craig Wood is a B.O. Smith Research Professor in the Department of Educational Leadership, College of Education, University of Florida, Gainesville.

BEST COPY AVAILABLE